Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

FORT PECK HOUSING AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; ALPHONSO JACKSON, SECRETARY OF HOUSING AND URBAN DEVELOPMENT; MICHAEL LIU, ASSISTANT SECRETARY FOR PUBLIC AND INDIAN HOUSING

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Native American Housing Assistance and Self Determination Act of 1996 (NAHASDA), Congress directed the Secretary of Housing and Urban Development (HUD) to establish a formula to allocate annual block grants to Indian Tribes for affordable housing activities. Congress directed that the formula be based on factors which reflect housing need, including three explicit factors. The first factor is the number of dwelling units owned or operated by the Tribes under the 1937 Housing Act at the time the regulations became effective. 25 U.S.C. § 4152 (b) (1). The Secretary promulgated a regulation, 24 C.F.R. § 1000.318, that removes some of these dwelling units from the formula. After the regulation was invalidated by the district court as violative of the statute, Congress amended the statute to incorporate, with significant exceptions, part of the regulation into the statute. The questions presented are:

(1) When Congress mandates a definitive number of units to be considered as a factor in an annual funding formula, may the Secretary lawfully impose a regulation that fails to include all of the units in the formula?

(2) The Tenth Circuit declined to address the effect of the 2008 amendment on the regulation's validity. Does the amendment of the statute following the district court's decision support the district court's ruling that the regulation was invalid prior to the amendment?

(3) Does the Tenth Circuit's decision that the Secretary may exclude dwelling units from the formula conflict with the decisions of other circuits holding that

statutory factors which Congress mandates for consideration by an Agency must be considered in full?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 2

STATEMENT 8

REASONS FOR GRANTING THE PETITION 14

CONCLUSION 30

APPENDIX

Circuit Court Opinion 1a
District Court Order Granting Defendants' Motion to Amend Judgment 30a
District Court Order Denying Plaintiff's Rule 59(e) Motion 32a
District Court Memorandum Opinion and Order 37a
Order Denying Rehearing 60a

TABLE OF AUTHORITIES

Page

CASES

14 PENN PLAZA LLC v. PYETT, 129 S. CT. 1456, 1472 (U.S. 2009) 17
ARROW FASTENER CO. v. COMMISSIONER, 76 T.C. 423, 431 (T.C. 1981) 25
BARNHART v. SIGMON COAL CO., 534 U.S. 438, 461-462 (U.S. 2002) 15
BENNETT v. NEW JERSEY, 470 U.S. 632, 637 (U.S. 1985) 23
BURLINGTON TRUCK LINES, INC. v. UNITED STATES, 371 U.S. 156, 168, (1962) 21
COMMISSIONER v. CALLAHAN REALTY, 143 F.2D 214 (2ND CIR. 1944) 24, 25
CONNECTICUT NAT. BANK v. GERMAIN, 503 U.S. 249, 253-254, 117 L. ED. 2D 391, 112 S. CT. 1146 (1992) 14
ETSI PIPELINE PROJECT v. MISSOURI, 484 U.S. 495, 517 (1988) 17
FDA v. BROWN & WILLIAMSON TOBACCO CORP., 529 U.S. 120, 125 (2000) 17
FORT PECK HOUSING AUTHORITY v. HUD, 435 F. SUPP. 1125, 1132-1135 (D. COLO. 2006) ..... *passim*
FOWLER v. UNIFIED SCHOOL DIST. 259, 128 F.3D 1431, 1435-36 (10TH CIR. 1997) 23
FULTS v. SANDERS, 442 F.3D 1088, 1092 (8TH CIR. ARK. 2006) 26, 28
GHS HMO, INC. v. UNITED STATES, 536 F.3D 1293, 1300 (FED. CIR. 2008) 21
HELVERING v. CREDIT ALLIANCE CORP., 316 U.S. 107 (1942) 25
HEWITT v. HELMS, 459 U.S. 460, 471(1983) 15
HILL v. NORTON, 275 F.3D 98, 105 (D.C. CIR. 2001) 21
KOSHLAND v. HELVERING, 298 U.S. 441, 447 (U.S. 1936) 17
LANDSTAR EXPRESS AM., INC. v. FMC, 569 F.3D 493, 498 (D.C. CIR. 2009) 28
LEVINE v. APKER, 455 F.3D 71, 81 (2D CIR. 2006) 26, 27, 28
LEXECON INC. v. MILBERG WEISS BERSHAD HYNES &

LERACH, 523 U.S. 26, 35 (1998) 15
MANSELL V. MANSELL, 490 U.S. 581, 594 (U.S. 1989) 17
MUNIZ V. SABOL, 517 F.3D 29 (1ST CIR. MASS. 2008), CERT DENIED GONZALEZ V. SABOL, 129 S. CT. 115 (2008) 28
NATURAL RESOURCES DEFENSE COUNCIL, INC. V. DALEY, 209 F.3D 747, 753-754 (D.C. CIR. 2000) 18
NUCLEAR ENERGY INST., INC. V. EPA, 373 F.3D 1251 (D.C. CIR. 2004) 18
RODRIGUEZ V. SMITH, 541 F.3D 1180, 1187 (9TH CIR. CAL. 2008) 26, 29
SIERRA CLUB V. EPA, 356 F.3D 296, 306 (D.C. CIR. 2004) 17, 18
SUITER V. MITCHELL MOTOR COACH SALES, 151 F.3D 1275, 1281, N.7 (10TH CIR. 1998) 23, 25
UNITED KEETOOWAH BAND OF CHEROKEE INDIANS V. HUD, 567 F.3D 1235 (10TH CIR. 2009) 15, 18, 19, 29
UNITED STATES V. GONZALES, 520 U.S. 1, 6, 10 (U.S. 1997) 17
UNITED STATES V. PERRY, 360 F.3D 519, 535 (6TH CIR. 2004) 19
UNITED STATES V. WILLIAMS, 553 U.S. 285, 294 (2008) 18
WASH. MARKET CO. V. HOFFMAN, 101 U.S. 112, 115-16 (1879) 19
WEDELSTEDT V. WILEY, 477 F.3D 1160 (10TH CIR. 2007) 26, 27, 28, 29
WOODALL V. FED. BUREAU OF PRISONS, 432 F.3D 235 (3D CIR. 2005) 26, 27, 29
ZUNI PUB. SCH. DIST. NO. 89 V. DEP'T OF EDUC., 550 U.S. 81, 105 (U.S. 2007) 17

STATUTES

5 U.S.C. § 701-706 8
25 U.S.C. § 1461 11
25 U.S.C. § 4101 8
25 U.S.C. § 4132 21
25 U.S.C. § 4133 21
25 U.S.C. § 4152 ..... 8, 13
25 U.S.C. § 4152(a) 2, 8
25 U.S.C. § 4152(b)(1)(E) (2010) 23

25 U.S.C. § 4181 9
25 U.S.C. § 4181(a) 5
25 USCS § 4116 3
25 USCS § 4152(b)(1) 6, 9
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1331 8
28 U.S.C. § 2101(c) 1
42 U.S.C. § 1437 4

RULES

Supreme Court Rule 13.3 1

REGULATIONS

24 C.F.R. § 1000.301-340 9
24 C.F.R. § 1000.310 6
24 C.F.R. § 1000.312 ..... 6, 9, 20
24 C.F.R. § 1000.314 ..... 6, 9
24 C.F.R. § 1000.318 13
24 C.F.R. § 1000.318(a) 7, 8, 10, 11
24 C.F.R. § 1000.322 7
63 Fed. Reg. 12334 (Thursday, March 12, 1998) 9

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Tenth Circuit in *Fort Peck Hous. Auth. v. United States HUD*, No. 06-1425, (10th Cir. 2010), is set forth in the Appendix hereto (App. 1a-23a).

The published decision of the District Court for the District of Colorado in *Fort Peck Housing Auth. v. HUD*, 435 F. Supp. 2d 1125 (D. Colo. 2006), is set forth in the Appendix hereto (App. 37a-59a). Subsequent post judgment opinions of the District Court are set out in the appendix (App 30a-36a).

JURISDICTION

The decision of the United States Court of Appeals for the Tenth Circuit reversing the judgment of the District Court was filed on February 19, 2010. The timely Petition for Rehearing was denied on May 6, 2010. This petition for writ of certiorari is filed within ninety (90) days of the date of the court of appeals' denial of rehearing. 28 U.S.C. § 2101(c); Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

25 U.S.C. § 4152(a)- (b):

Prior to its amendment on October 14, 2008 the statute stated:

> (a) Establishment.
> The Secretary shall, by regulations issued not later than the expiration of the 12-month period beginning on October 26, 1996, in the manner provided under section 4116 of this title, establish a formula to provide for allocating amounts available for a fiscal year for block grants under this chapter among Indian tribes in accordance with the requirements of this section.
> (b) Factors for determination of need. The formula shall be based on factors that reflect the need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities, including the following factors:
> (1) The number of low-income housing dwelling units owned or operated at the time pursuant to a contract between an Indian housing authority for the tribe and the Secretary.
> (2) The extent of poverty and economic distress and the number of Indian families within Indian areas of the tribe.
> (3) Other objectively measurable conditions as the Secretary and the Indian tribes may specify.

Subsequent to its amendment on October 14, 2008 the statute now states:

(a) Establishment.

(1) In general. The Secretary shall, by regulations issued not later than the expiration of the 12-month period beginning on the date of the enactment of this Act [enacted Oct. 26, 1996], in the manner provided under section 106 [25 USCS § 4116], establish a formula to provide for allocating amounts available for a fiscal year for block grants under this Act among Indian tribes in accordance with the requirements of this section.

(2) Study of need data.

(A) In general. The Secretary shall enter into a contract with an organization with expertise in housing and other demographic data collection methodologies under which the organization, in consultation with Indian tribes and Indian organizations, shall—

(i) assess existing data sources, including alternatives to the decennial census, for use in evaluating the factors for determination of need described in subsection (b); and

(ii) develop and recommend methodologies for collecting data on any of those factors, including formula area, in any case in which existing data is determined to be insufficient or inadequate, or fails to satisfy the requirements of this Act.

(B) Authorization of appropriations. There are authorized to be appropriated such sums as are necessary to carry out this section, to remain available until expended.

(b) Factors for determination of need. The formula shall be based on factors that reflect the

need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities, including the following factors:

(1) (A) The number of low-income housing dwelling units developed under the United States Housing Act of 1937 (42 U.S.C. 1437 et seq.), pursuant to a contract between an Indian housing authority for the tribe and the Secretary, that are owned or operated by a recipient on the October 1 of the calendar year immediately preceding the year for which funds are provided, subject to the condition that such a unit shall not be considered to be a low-income housing dwelling unit for purposes of this section if—

(i) the recipient ceases to possess the legal right to own, operate, or maintain the unit; or

(ii) the unit is lost to the recipient by conveyance, demolition, or other means.

(B) If the unit is a homeownership unit not conveyed within 25 years from the date of full availability, the recipient shall not be considered to have lost the legal right to own, operate, or maintain the unit if the unit has not been conveyed to the homebuyer for reasons beyond the control of the recipient.

(C) If the unit is demolished and the recipient rebuilds the unit within 1 year of demolition of the unit, the unit may continue to be considered a low-income housing dwelling unit for the purpose of this paragraph.

(D) In this paragraph, the term "reasons beyond the control of the recipient" means, after making reasonable efforts, there remain—

(i) delays in obtaining or the absence of title status reports;

(ii) incorrect or inadequate legal descriptions or other legal documentation necessary for conveyance;

(iii) clouds on title due to probate or intestacy or other court proceedings; or

(iv) any other legal impediment.

(E) Subparagraphs (A) through (D) shall not apply to any claim arising from a formula current assisted stock calculation or count involving an Indian housing block grant allocation for any fiscal year through fiscal year 2008, if a civil action relating to the claim is filed by not later than 45 days after the date of enactment of this subparagraph [enacted Oct. 14, 2008].

(2) The extent of poverty and economic distress and the number of Indian families within Indian areas of the tribe.

(3) Other objectively measurable conditions as the Secretary and the Indian tribes may specify.

25 U.S.C. § 4181(a):

(a) Termination of assistance. After September 30, 1997, financial assistance may not be provided under the United States Housing Act of 1937 or pursuant to any commitment entered into under such Act, for Indian housing developed or operated pursuant to a contract between the Secretary and an Indian housing authority, unless such assistance is provided from amounts made available for fiscal year 1997 and pursuant to a commitment entered into

before September 30, 1997. Any housing that is the subject of a contract for tenant-based assistance between the Secretary and an Indian housing authority that is terminated under this section shall, for the following fiscal year and each fiscal year thereafter, be considered to be a dwelling unit under section 302(b)(1) [25 USCS § 4152(b)(1)].

24 C.F.R. § 1000.310:

What are the components of the IHBG formula?

The IHBG formula consists of two components:
(a) Formula Current Assisted Housing Stock (FCAS); and
(b) Need.

24 C.F.R. § 1000.314:

What is formula current assisted stock?

Formula current assisted stock is current assisted stock as described in § 1000.312 plus 1937 Act units in the development pipeline when they become owned or operated by the recipient and are under management as indicated in the Formula Response Form. Formula current assisted stock also includes Section 8 units when their current contract expires and the Indian tribe continues to manage the assistance in a manner similar to the Section 8 program, as reported on the Formula Response Form.

24 C.F.R. § 1000.318(a):

When do units under Formula Current Assisted Stock cease to be counted or expire from the inventory used for the formula?

(a) Mutual Help and Turnkey III units shall no longer be considered Formula Current Assisted Stock when the Indian tribe, TDHE, or IHA no longer has the legal right to own, operate, or maintain the unit, whether such right is lost by conveyance, demolition, or otherwise, provided that:

(1) Conveyance of each Mutual Help or Turnkey III unit occurs as soon as practicable after a unit becomes eligible for conveyance by the terms of the MHOA; and

(2) The Indian tribe, TDHE, or IHA actively enforce strict compliance by the homebuyer with the terms and conditions of the MHOA, including the requirements for full and timely payment.

24 C.F.R. § 1000.322:

Are IHA financed units included in the determination of Formula Current Assisted Stock?

No. If these units are not owned or operated at the time (September 30, 1997) pursuant to an ACC then they are not included in the

determination of Formula Current Assisted Stock.

STATEMENT

This case presents important issues involving a federal agency's authority to implement regulations which expand the plain meaning of Congress' authorizing statute. The district court had jurisdiction over this action pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, and 28 U.S.C. §§ 1331 (federal question) and 1346 (United States as a defendant), as this case was brought to challenge federal agency action and arises under the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), 25 U.S.C. §§ 4101 *et seq.* The district court invalidated the regulation at issue, 24 C.F.R. §1000.318(a), based on a literal reading of the plain language of the statute, 25 U.S.C. §4152 (b) (1). The Tenth Circuit disagreed, however and read the statute differently, even though it agreed that the language of the statute was plain and unambiguous.

Under NAHASDA, block grant funding is provided annually to all Tribally Designated Housing Entities ("TDHEs") for affordable housing programs. Congress directed the Secretary to promulgate regulations on or before October 26, 1997, through negotiated rulemaking that would implement Congress' formula for allocating block grant amounts made available each fiscal year. 25 U.S.C. § 4152(a). Congress directed that these regulations be based on factors that reflect the need of the tribes for low-income

housing assistance, "including" three specific factors. § 4152(b) (1)-(3). The first factor that Congress mandated be part of this formula was "the number of low income dwelling units" that each TDHE owned or operated pursuant to an annual contributions contract (ACC) with the Secretary at the time the regulations were to be implemented. § 4152(b)(1).

In response to § 4152, HUD formed a Negotiated Rulemaking Committee, and the final rule was implemented on March 12, 1998. 63 Fed. Reg. 12334 (Thursday, March 12, 1998). The block grant formula regulations are codified at 24 C.F.R. §§ 1000.301-340. The formula consists of two parts, "Formula Current Assisted Stock" (FCAS) and need. The FCAS part of the formula purports to include the number of dwelling units each TDHE had under an ACC as of September 30, 1997, in accordance with 25 U.S.C. § 4152(b)(1). The regulations refer to "Current Assisted Stock" consisting of all of a TDHE's dwelling units under a TDHE's management as of September 30, 1997, 24 C.F.R. § 1000.312. FCAS is defined as Current Assisted Stock plus all dwelling units "in the development pipeline" as of September 30, 1997 (i.e., units planned and under an ACC at the time, but not yet completed), plus units utilized to provide housing assistance which were previously managed under Section 8 of the 1937 Housing Act. 24 C.F.R. § 1000.314; See 25 U.S.C. § 4181 (a). However, §1000.318 excludes dwelling units referred to in the statute at §4152 (b) (1). Section 1000.318 (a) excludes dwelling units covered by the statute from being factored for block grant purposes when the TDHE conveys or demolishes a dwelling unit, even when the unit is replaced with a newly

constructed dwelling unit. The regulation as applied by HUD also eliminates mutual help units after the initial 25 year term, even when the TDHE has not conveyed the unit because of non-payment, non-eviction or other reasons, or when a mutual help unit was converted to low rent after September 30, 1997. 24 C.F.R. § 1000.318(a) (1)-(2); *See Fort Peck Housing Authority v. HUD*, 435 F. Supp. 1125, 1132-1135 (D. Colo. 2006). It is the validity of this regulation that is at the heart of this case.

The FPHA is the TDHE for the Assiniboine and Sioux Tribes, and receives an annual block grant from HUD to construct, operate, and maintain affordable housing for low-income families on the Fort Peck Indian Reservation in Montana. Like many TDHEs, the FPHA operates two major housing programs, a low rent housing program, and a homeownership program. The homeownership program is best described as a lease-to-own arrangement, which consists of the FPHA's Turnkey III and Mutual Help Homeownership Programs (referred to collectively as Mutual Help), under which eligible participating families are able to achieve ownership of single-family homes after leasing over an initial 25-year term, commencing on the units "Date of Full Availability" (DOFA). In order to achieve ownership, the family must make monthly payments over this 25-year term based upon a percentage of their income. Families who fail to make all the required payments are not eligible for conveyance.

The dispute began after HUD charged that the FPHA had been overfunded for fiscal years 1998-2002

because Mutual Help units were counted for funding purposes when, according to HUD, they were ineligible under § 1000.318(a). HUD demanded repayment in excess of 1.8 million dollars. *Fort Peck*, 435 F. Supp. 2d at 1130, n.5. The FPHA filed its Complaint in the district court below challenging HUD's overfunding determination. The FPHA argued that: 1) § 1000.318(a) was invalid because it conflicted with NAHASDA; 2) HUD was required to comply with the hearing requirements of 25 U.S.C. §§ 1461 and 1465 prior to seeking the repayment of the disputed block grant funds; and 3) that HUD lacked the legal authority to require the FPHA to repay funds that had already been awarded. *Fort Peck*, 435 F. Supp. at 1131.

The district court agreed with the FPHA's first argument that the exclusion of Mutual Help units from the block grant formula under § 1000.318(a) runs afoul of the plain language of § 4152(b) (1):

> The text of the statute makes its meaning is clear. The use of that word "shall" limits the agency's discretion. Congress expressly directed that the first factor in determining a tribe's need for housing assistance is the number of dwelling units for which a tribe was receiving federal assistance when NAHASDA went into effect. The use of the phrase "the number" is definitive. The statute leaves no room for the formula to include some, but not all of the number of dwelling units that a tribe owned or operated pursuant to an ACC.

Fort Peck, 435 F. Supp. 2d at 1132.

The district court also held that § 1000.318(a) (1)-(2) could not be reconciled with § 4152(b), because it was not reasonably related to housing needs within the meaning of NAHASDA, and was not consistent with the overall goal of NAHASDA to encourage Indian self-determination. 435 F. Supp. 2d at 1133-1135. Because the district court held the regulation invalid, the court did not address the merits of the FPHA's other two claims. *Id.* at 1131, 1135.

The Tenth Circuit agreed that the statute was plain and unambiguous, but interpreted the language differently and reversed, holding that the regulation did not violate §4152(b), and that the regulation validly excluded dwelling units which the FPHA "no longer owned or operated." (App. 3a, 15a and 17a). Focusing on the phrase "based on" in the statute, the Tenth Circuit held that the definitive number of dwelling units mandated in § 4152(b) (1) was merely a starting point, and that HUD could reduce the number of dwelling units under the third catch all factor, §4152 (b) (3), which includes "other objectively measurable conditions as the Secretary and the Indian Tribes may specify". (App. 13a-15a). This "interplay" between subsections (1) and (3) in the court's view, justified the regulation. (App. 17a). The Tenth circuit did not address the validity of the regulation as it applied to excluded dwelling units which were still owned and operated by TDHEs, though the FPHA asked it to do so in its petition for rehearing.

Following the district court's ruling but prior to the Tenth Circuit decision on appeal, § 4152 (b) (1) was amended by the NAHASDA Reauthorization Act of

2008, P.L. 110-411 (October 14, 2008). The amendment deleted subsection (b) (1) entirely and replaced it with extensive provisions that incorporated, with significant modifications, some of the provisions of 24 C.F.R. § 1000.318 (a). The new version of the statute allows HUD to exclude from the formula dwelling units if the TDHE loses the "legal right to own, operate or maintain the unit" or the unit is lost due to "conveyance, demolition, or other means." 25 U.S.C. § 4152 (b) (1) (A). The amendment also provides that if a homeownership unit is not conveyed at the end of its 25 year term the TDHE "shall not be considered to have lost the legal right to own, operate, or maintain the unit" if the unit has not been conveyed "for reasons beyond the control of the recipient". §4152 (b) (1) (B). The term "reasons beyond the control of the recipient" is defined in §4152(b) (1) (D) and generally prohibits removal of a dwelling unit if there remain legal impediments to conveyance after reasonable efforts to convey have been made. Finally, Congress provided that the amendments do not apply to any TDHE with a claim challenging an FCAS calculation for any fiscal year through 2008 if a civil action was filed within 45 days of the enactment of the amendment. § 4152 (B) (1) (E).

Following the district court decision and the amendment to §4152 (b), a number of Tribes and TDHEs filed *Fort Peck* type actions in federal district court and the federal court, involving millions of dollars in disputed FCAS funding. Many of these actions were stayed pending the decision of the tenth circuit in this case. Because the tenth circuit's decision is

unpublished, it is not binding precedent, but may be cited for its persuasive value. (App. 3a, 19a n.*).

REASONS FOR GRANTING THE PETITION

1. The Court Should Grant Review to Reaffirm the Principle That Courts Must Apply the Plain Language of Statutes Literally in Accordance with Their Text, Without Resort to Perceived Post Hoc Notions of Legislative Intent or Deference to the Agency Charged with the Statutes Implementation.

In cases where the text of a statute is clear and explicit, this Court has admonished the judiciary and federal agencies to apply the statute in accordance with its plain text:

> Our role is to interpret the language of the statute enacted by Congress. This statute does not contain conflicting provisions or ambiguous language. Nor does it require a narrowing construction or application of any other canon or interpretative tool. "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-254, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992) (quoting Rubin v. United States, 449 U.S. 424, 430, 66 L. Ed. 2d 633, 101 S. Ct. 698 (1981)) (internal citations omitted). We will not

> alter the text in order to satisfy the policy preferences of the Commissioner. These are battles that should be fought among the political branches and the industry. Those parties should not seek to amend the statute by appeal to the Judicial Branch.

Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461-462 (U.S. 2002)

The district court was faithful to this command, but the tenth circuit panel was not. Both the tenth circuit and the district court held that the language of section 4152(b) was plain and ambiguous, in accord with *United Keetoowah Band of Cherokee Indians v. HUD*, 567 F.3d 1235 (10th Cir. 2009), and yet both courts reached opposite conclusions. The district court invalidated §1000.318 (a) based on a literal reading of the text of §4152 (b) (1), holding that the word "shall" in subsection (b) was a mandate that left no room for the exercise of discretion. *Fort Peck*, 435 F. Supp. 2d at 1132; *Accord, Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (concluding that "the mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion"); *Hewitt v. Helms*, 459 U.S. 460, 471(1983) (calling shall "language of an unmistakably mandatory character"). The district court then applied a literal straight forward reading to subsection (b) (1), holding that definitive number of units mandated to be counted in subsection (b) (1) left no room for the agency to consider some, but not all of the units in the block grant formula. *Id.* at 1132.

The tenth circuit panel, on the other hand, focused on the phrase "based on" in section 4152(b), and concluded that this phrase, though admittedly ambiguous by itself, means that the factors described in subsections (1)-(3) "form the basis, beginning, or starting point, of the formula". (App. 13a). The tenth circuit reasoned that as long as HUD considered all of the dwelling units as a starting point, HUD could then backtrack and exclude units from the formula under the catch all subsection (b) (3), which allows HUD to consider "other objectively measurable conditions". (App. 14a-15a). According to the court, an interpretation allowing HUD to exclude covered dwelling units from the formula was more in line with the overall intent of NAHASDA. (App. 15a- 16a). Such an interpretation simply cannot stand in light of *Barnhart* and the Court's other cases mandating that statutes be interpreted in accordance with their plain text, without regard to perceived notions of legislative intent. The tenth circuit's interpretation is fundamentally flawed because it fails to recognize that Congress itself explicitly declared in subsection (b) (1) that an important part of a recipient's need is reflected by the definitive number of dwelling units for which a tribe was receiving federal assistance when NAHASDA went into effect, explicitly describing a definite number as of a definite date. The text of the statute allows for nothing less. There is no gap to fill, nothing for the agency to interpret.

Reduced to its essence, the tenth circuit decision lays aside the plain text of § 4152 (b) (1) in favor of an interpretation favored by HUD, one that the court felt was more in line with the intent of Congress. Such an

interpretation cannot stand in light of *Barnhart* and the Court's other decisions. *See, eg, FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) ("Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law." (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)); *Koshland v. Helvering*, 298 U.S. 441, 447 (U.S. 1936) ("where, as in this case, the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation"); *14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1472 (U.S. 2009)*; *United States v. Gonzales*, 520 U.S. 1, 6, 10 (U.S. 1997); *Mansell v. Mansell*, 490 U.S. 581, 594 (U.S. 1989); *See also, Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 105 (U.S. 2007)* (Scalia, J., dissenting) (stressing that judge supposed legislative intent cannot override the plain text of a statute). The tenth circuit decision conflicts with these fundamental principles by failing to adhere to the plain text of subsection (b) (1) and by failing to recognize that when Congress explicitly defines a factor in a funding formula, that factor must be applied without exception or limitation.

The tenth circuit's use of the phrase "based on" to circumvent the literal text of subsection (b) (1) does not survive serious scrutiny. The court relied on the D.C. circuit's decision in *Sierra Club v. EPA*, 356 F.3d 296, 306 (D.C. Cir. 2004) to support its conclusion. However, other D.C. circuit cases undermine the tenth circuit's analysis when the phrase "based on" is read in context. First, the court in *Sierra Club* acknowledged

that the phrase "based on", by itself, is ambiguous. *Id.* But the tenth circuit acknowledged, as it must, that § 4152, when read in context, is unambiguous. (App. 13a, 15a-16a); *Accord, Keetoowah*, 567 F.3d at 1240-1242. The tenth circuit's focus on the ambiguous term "based on" is narrowed by "the commonsense canon of noscitur a sociis —which counsels that a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008). Thus, when the term "based on" in §4152(b) is coupled with the definitive number stated in the text of subsection (b) (1), the phrase becomes unambiguous. Notably, the D.C. circuit has qualified *Sierra Club*, consistent with this maxim. The D.C. circuit explained its decision in *Sierra Club in Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251 (D.C. Cir. 2004) . The court there clarified that the phrase "based on" when used to describe a factor in a statute is ambiguous when it is not limited by a specific number. However, when the statute prescribes "a precise quota figure," the meaning of the statute becomes plain. *Id.* at 1269, citing *Natural Resources Defense Council, Inc. v. Daley*, 209 F.3d 747, 753-754 (D.C. Cir. 2000).

The failure of the tenth circuit to read the phrase "based on" in its proper context also runs afoul of its own decision in *Keetoowah*. According to *Keetoowah*, "[s]ection 4152(b) states that the formula must be based on "factors that reflect the need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities, **including three specific factors.**" 567 F.3d at 1242 (emphasis added). Keetoowah noted that "subsection (b) (3) is simply one of the need-based factors that Congress explicitly

specified." *Id.* Moreover, the tenth circuit's holding here, that the catch all factor in subsection (b) (3) authorized HUD to exclude dwelling units prescribed in subsection (b) (1) despite its literal text, violates other important canons of statutory construction. "One of the most basic canons of statutory interpretation is that a more specific provision takes precedence over a more general one." *United States v. Perry*, 360 F.3d 519, 535 (6th Cir. 2004) (citing *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524, (1989) and *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). Second, courts:

> are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. ...a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.

Perry, 360 F. 3d at 537, quoting *Wash. Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879).

The tenth circuit panel was concerned that allowing the dwelling units described in subsection (b) (1) to be funded "in perpetuity" even after the units have been conveyed or demolished, does not reflect need. (App. 14a). This concern, however, is not warranted and in any event is insufficient to disregard a congressional mandate under the analyses in *Barnhart*. First, it was undisputed that dwelling units that are conveyed or demolished can be replaced with new units, and in fact dwelling units were replaced

in this case as the district court noted. *Fort Peck*, 435 F.Supp.2d at 1133, n 8 and accompanying text. Yet HUD's Formula regulations do not account for this reality, but instead provide for a continual decrease in the dwelling unit factor mandated by section 4152 (b) (1) and expressly preclude the inclusion of newly constructed units as replacements in the formula. 24 C.F.R. §§ 1000.312, 1000.314, and 1000.322. This anomaly led the district court to conclude that § 1000.318 "has the perverse effect" of turning the number of dwelling units mandated as formula factors into an ever declining factor, with no regard for the fact that the number can remain at the 1997 number mandated by 4152(b)(1) when units are built to replace the lost units. *Fort Peck*, 435 F.Supp.2d at 1132. HUD's argument, which the tenth circuit accepted, that conveyed or lost units no longer reflect need and must therefore be eliminated as a formula factor, was not supported by the administrative record.

Moreover, the tenth circuit failed to consider the fact that low income Indian families who become homeowners or whose units become eligible for conveyance are in many cases still low income and in need of affordable housing assistance. As the district court noted, some homebuyers are behind in their payments at the expiration of the 25 year term, and others are simply not ready for homeownership when the unit becomes eligible for conveyance, in which case the unit may be converted to low rent and continue to be owned and operated by the FPHA. *Fort Peck*, 435 F.Supp.2d at 1132-33. Yet HUD insists that these units may not be counted for formula purposes, under the guise of §1000.318. Further, FPHA Policies required by 25

U.S.C. § 4133, submitted as part of the administrative record, allow dwelling units that have been conveyed or are eligible for conveyance to be modernized and remodeled using NAHASDA funds. In many cases Homeownership units are in need of such assistance even after they have been conveyed, because in many cases they have become dilapidated due to the homebuyers inability to afford repair and maintenance costs. Even conveyed dwelling units remain eligible for housing assistance because there is a need to keep these units safe and habitable, even after they have reached the end of the 25 year term. *See* 25 U.S.C. § 4132 (1). There was nothing in the administrative record to support the notion that the dwelling units described in §4152(b) (1), and the families who occupy them somehow magically lose there need simply because the units were conveyed. On the contrary, HUD pushed this post hoc rationalization in an attempt to save the regulation, something that the tenth circuit should not have permitted. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, (1962); ("the courts may not accept appellate counsel's post hoc rationalizations for agency action."); *See*, *Hill v. Norton*, 275 F.3d 98, 105 (D.C. Cir. 2001); *GHS HMO, Inc. v. United States*, 536 F.3d 1293, 1300 (Fed. Cir. 2008).

In the end, the Court's decision in *Barnhart* requires courts to follow the plain text of an unambiguous statute, without regard to canons of interpretation or policy notions of what Congress really intended. The Court should grant certiorari to reaffirm this principle.

2. The Court should Grant Certiorari to Resolve the Important Federal Question of Whether the Intervening Amendment to § 4152 (b) (1) Which Incorporated Part of the Regulation Invalidated by the District Court Supports the District Court's Decision.

Congress amended sections 4152 (b) (1) to incorporate parts of the regulation invalidated by the district court after this case was briefed and argued before the tenth circuit panel. Although both parties filed supplemental letter briefs addressing the amendment's potential effect on the issues following oral argument, the Tenth Circuit did not address the effect of the amendments to section 4152 (b) in its Order and Judgment. See Appendix A, Slip Op. 2 n.1. The Petitioner also asked the court to address the amendment's effect in its Petition for Rehearing, which was denied without opinion. (App. 60a). The fact that HUD implemented a regulation which was invalidated by a federal court, and then went back to Congress to advocate a change in the statute to incorporate the regulation, presents a serious federal question concerning the roles of administrative agencies Congress and the judiciary. What seems apparent is that HUD made law in the form of a regulation and then asked Congress to approve the law after the district court determined that the regulation violated the statute. In effect, the legislative and administrative process has been stood squarely on its head in this case.

The 2008 amendment to § 4152(b) effects a substantive change in the language and meaning of the original version of the statute. The amendment deleted

§4152(b) (1) entirely and substituted new language which incorporated, with significant modifications, the regulation invalidated by the district court. HUD lobbied for the amendment after the district court decision, calling the amendment a "change" in the existing statute. *See Reauthorization of the Native American Housing Assistance Self-Determination Act: Hearing before the H. Comm. on Financial Services Subcommittee on Housing & Community Opportunity*, 110th Cong. 45 (2007) (statement of Orlando J. Cabrera, Asst. Sec. for Public & Indian Housing, U.S. Dept. of Housing and Urban Dev.); *see also Legislative Hearing on Discussion Draft Legislation to Amend and Reauthorize the Native American Housing Assistance and Self-Determination Act: Hearing before the S. Comm. on Indian Affairs*, 110th Cong. 3 (2007) (statement of Rodger J. Boyd, Deputy Asst. Sec. for Native American Programs Office of Public Health and Indian Housing, U.S. Dept. of Housing and Urban Dev.). Because the amendment changed the plain language of §4152(b) (1), it may only be applied prospectively. *Bennett v. New Jersey*, 470 U.S. 632, 637 (U.S. 1985); *See Suiter v. Mitchell Motor Coach Sales*, 151 F.3d 1275, 1281, n.7 (10th Cir. 1998); *See also Fowler v. Unified School Dist. 259*, 128 F.3d 1431, 1435-36 (10th Cir. 1997).

In this regard, is significant that Congress expressly declined to apply the amendment retroactively. *See* 25 U.S.C. §4152(b)(1)(E) (2010). That Congress saw the need to amend §4152(b)(1) to accommodate part of the regulation invalidated by the district court, and refused to apply the amendment retroactively, is strong evidence that the original

statute did not authorize the regulation. In *Commissioner v. Callahan Realty*, 143 F.2d 214 (2nd Cir. 1944), the second circuit reviewed a decision of the U.S. tax court which invalidated an IRS regulation that used the term "sale or exchange" when the authorizing statute used the word "sale", even though another subsection of the same statute had used the same term as the regulation. Congress subsequently amended the statute to incorporate the regulation, but made the amendment effective upon enactment. The second circuit rejected the IRS's argument that its regulation was valid in light of the fact that the statute was amended to incorporate the challenged regulation, despite the fact that the legislative history described the amendment as a clarification:

> This limitation upon the effect of the amendment seems to us to show that it plainly was not made merely to clarify existing law. Had the intent of Congress been only to state more clearly what the statute had meant from its original enactment, there would have been no point in limiting the effect of the restatement to the period following December 31, 1936. We think such a limitation shows that it did realize that the amendment enlarged the scope of original enactment and made sure that taxpayers would understand that it was not to be applied retroactively....
>
> **We think it now tips the scales in favor of the respondent and leads to the conclusion that the regulation was a broadening of the original statute involving legislation beyond**

> **the power of the treasury. Until Congress itself amended the statute the regulation went beyond its scope and was invalid.** The decision of the Tax Court was therefore right.

143 F.2d at 216 (2d Cir. 1944) (emphasis added); *See Arrow Fastener Co. v. Commissioner*, 76 T.C. 423, 431 (T.C. 1981) (following *Callahan* and holding that the IRS had no power to promulgate a regulation adding provisions that it believed Congress should have included, citing *Helvering v. Credit Alliance Corp.*, 316 U.S. 107 (1942)).

The tenth circuit is in accord with the analysis in *Callahan*. *Suiter*, 151 F.3d at 1281. n.7. (holding that a subsequent amendment to a statute that validated an agency's authority under an existing regulation did not affect the court's decision that the regulation was invalid prior to the amendment). That Congress saw fit to rewrite the statute in question here, in order to adopt acceptable parts of the regulation invalidated by the district court, supports the conclusion that the original statute could not accommodate the regulation. The Court should take up and resolve the important federal question of whether the district court was correct in light of the intervening amendment to § 4152 (b) (1) and the second circuit's holding in *Callahan*. Alternatively, Petitioner respectfully requests that the Court grant its petition, vacate the tenth circuit's decision, and remand for reconsideration in light of the 2008 amendment and the decision in *Callahan*.

3. The Tenth Circuit's Decision Conflicts with the Decisions of Other Circuits and Within the Tenth Circuit Itself Which Hold that Statutory Factors Which Congress Mandates for Consideration by an Agency Must be Considered in Full.

The tenth circuit's decision upholding HUD's right to exclude dwelling units from being considered in the block grant formula conflicts with the decisions of other circuits involving the application of congressionally mandated factors for agency consideration. *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235 (3d Cir. 2005) ; *Levine v. Apker*, 455 F.3d 71, 81 (2d Cir. 2006) ; *Fults v. Sanders*, 442 F.3d 1088, 1092 (8th Cir. Ark. 2006); and *Rodriguez v. Smith*, 541 F.3d 1180, 1187 (9th Cir. Cal. 2008). The Tenth circuit's decision also conflicts with its own published decision in *Wedelstedt v. Wiley*, 477 F.3d 1160 (10th Cir. 2007). All of these cases hold that when Congress instructs an agency to consider specific factors in its implementation of a statute, those factors must be considered in full. Considering the analysis undertaken in these cases, the tenth circuit's decision in this case also conflicts with its own published decision in *Keetoowah*.

Prior to its amendment, Section 4152(b) (1) stated clearly that the block grant formula "shall be based on factors which reflect the need of the Indian tribes" for affordable housing, "**including**" three explicit factors. In *Wedelstedt* , this Court interpreted a statute which mandated the Bureau of Prisons (BOP) to consider five enumerated factors in determining whether to transfer an inmate to a correctional facility, and invalidated a BOP regulation that allowed the BOP

to refuse to transfer certain inmates without considering the enumerated factors in full. *Wedelstedt*, 477 F.3d at 1164. The Court followed the decisions of the second, third and eighth circuits that had reached the same conclusion, *Woodall*, *Levine*, and *Fults*. The *Wedelstedt* court adopted the more rigorous textual analysis of the statute's language undertaken in *Woodall* and *Levine*. 477 F.3d at 1166. *Woodall* held that the BOP could not "categorically refuse to consider in full one of the factors explicitly enumerated" in the statute. *Woodall*, 432 F.3d at 247. "[W]e are faced with a statute providing that the BOP must consider several factors in CCC placement, and a regulation providing that the agency may not consider those factors in full. The conflict between the regulation and the statute seems unavoidable." Id. at 249; *accord*, *Wedelstedt*, 477 F.3d. at 1164. The court in *Levine* noted that, while the agency had discretion to consider factors for placing or transferring prisoners, Congress was "not silent on the criteria for placing a prisoner". *Levine* , 455 F.3d at 81. The court held that the agency was required to consider these factors in all placement or transfer decisions, and could not categorically exclude some prisoners from consideration of all five factors:

> What agencies may not do, however, is edit a statute. Categorical rulemaking, like all forms of agency regulation, must be consistent with unambiguous Congressional instructions. And, an agency may not promulgate categorical rules that do not take account of the categories that are made significant by Congress. ... The BOP is not empowered to implement selectively the instructions given by § 3621(b), **by picking and**

choosing those factors that it deems most compelling.

Levine, 455 F.3d at 85, (emphasis added); accord, *Landstar Express Am., Inc. v. FMC*, 569 F.3d 493, 498 (D.C. Cir. 2009) (rejecting the argument that the plain reading of a statute's text undermines its purpose, and noting that "neither courts nor federal agencies can rewrite a statute's plain text to correspond to its supposed purposes").

The court in *Levine* also rejected the agency's assertion that it considered all five of the congressionally mandated factors when it initially promulgated the regulation categorically excluding some of the factors for some inmates. Id. at 85, n9; accord, *Wedelstedt*, 477 F.3d at 1168; See *Fults*, 442 F.3d at 1092 ("It is impossible for the BOP to consider all five factors on a categorical basis"). These holdings, as well, conflict with the tenth circuit's decision in this case, that the mandatory dwelling unit number in § 4152 (b) (1) is a mere starting point (App. 14a).

The first circuit is the only circuit to disagree with the *Woodall* line of cases. In *Muniz v. Sabol*, 517 F.3d 29 (1st Cir. Mass. 2008), cert denied *Gonzalez v. Sabol*, 129 S. Ct. 115 (2008), the court held that the five factors listed in the statute were not exclusive. *Muniz*, 517 F.3d at 35. The court added that, in its view, "[n]othing in [the statute] requires consideration of the five factors for every facility or type of facility that is ruled out. Nor is there a clear expression of intent to withhold the authority to make rules of general applicability." Id. at 38. Subsequent to *Muniz*, the ninth

circuit aligned itself with the *Woodall* line of cases and invalidated the same regulation, holding that "an 'unavoidable conflict' exists because the statute requires the BOP to consider five factors in determining CCC placement, while the regulation provides that the enumerated factors will not be fully considered." *Rodriguez*, 541 F.3d at 1187, quoting *Woodall*, 432 F.3d at 249. Although agreeing with *Muniz* that the statute did not preclude rules of general applicability, the court held that no rule of general applicability could categorically exclude consideration of the five enumerated factors in the statute, because these factors were, by virtue of the statute, mandatory. *Rodriguez*, 541 F.3d at 1187.

The statutory command in §4152(b) is even more explicit than the statute at issue in the *Woodall* line of cases. According to *Keetoowah*, "[s]ection 4152(b) states that the formula must be based on "factors that reflect the need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities, **including three specific factors.**" 567 F.3d at 1242 (emphasis added). *Keetoowah* also held that "subsection (b) (3) is simply one of the need-based factors that Congress explicitly specified." *Id.* *Wedelstedt* held that the agency had to make placement decisions "with reference to **each of the five factors** enumerated" in the statute. 477 F.3d at 1166 (emphasis added). Read together, these cases reject the tenth circuit panel's interpretation in this case, one that would play one subsection off against another, or an interpretation of one subsection that would limit or supplant part of another, as the panel decision does here. (App. 15a, 17a). To do so is inconsistent with the analysis in

Keetoowah and *Wedelstedt*, and the rules of statutory interpretation discussed in Part 2 of this petition.

CONCLUSION.

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Tenth Circuit and to vacate or reverse the judgment and remand the matter to the Tenth Circuit with instructions to affirm the district court's judgment invalidating the regulation, or provide petitioners with such other relief as the Court deems fair and just under the circumstances of this case.

Respectfully submitted,

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No. 06-1425 & 06-1447
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FORT PECK HOUSING AUTHORITY,
Plaintiff - Appellee/Cross-Appellant,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; ALPHONSO JACKSON, Secretary of Housing and Urban Development; MICHAEL LIU, Assistant Secretary for Public and Indian Housing,
Defendants - Appellants/Cross-Appellees.

OGLALA SIOUX (LAKOTA) HOUSING; SICANGU WICOTI AWANYAKAPI CORPORATION; TURTLE MOUNTAIN HOUSING AUTHORITY; LOWER BRULE HOUSING AUTHORITY,
Movants.

February 19, 2010, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

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JUDGES: Before LUCERO, ANDERSON, and O'BRIEN, Circuit Judges.

ORDER AND JUDGMENT *

This case involves the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), 25 U.S.C. §§ 4101-4243.[1] In that act Congress directed the Department of Housing and Urban Development (HUD) to enter into a collaborative process with interested Native American tribes and their designated housing entities (Tribal Housing Entities) to adopt regulations providing for an annual, equitable distribution of available funds for low-income housing assistance. A regulation promulgated in 1998 disqualified funding for housing units which were no longer owned or operated by a Tribal Housing Entity. 24 C.F.R. § 1000.318. In subsequent years HUD mistakenly overpaid Fort Peck Housing Authority (Fort Peck) for dwelling units it no longer owned or operated. After discovering its oversight HUD

demanded a refund. Fort Peck partially repaid HUD, but then sued, alleging the "owned or operated" regulation was invalid. The district court agreed but determined Fort Peck was not entitled to a return of all monies it had already refunded. HUD appealed from the court's invalidation of its regulation and Fort Peck cross-appealed from the denial of return of its repayments. We reverse the invalidation of HUD's regulation, dismiss Fort Peck's cross-appeal, and remand.

I.

A. Relevant Statutory and Regulatory History

Prior to 1997,[3] financial assistance for low-income housing programs arose through a number of separate programs under the Housing Act of 1937. *See* Implementation of the Native American Housing Assistance and Self-Determination Act of 1996, Proposed Rule, 62 Fed. Reg. 35,718, 35,719 (July 2, 1997). Some programs helped Indian families afford low-income rental options and others allowed families to purchase housing through lease-to-own or lease-purchase agreements. This financial assistance was awarded according to the terms of individual Annual Contribution Contracts (ACCs) between the government and individual Indian tribes or Tribal Housing Entities. *See* 24 C.F.R. § 1000.10(b) (defining "Annual Contributions Contract"). Each ACC was awarded a certain amount of funding for the Tribal Housing Entity to cover the costs of specific public housing projects. 42 U.S.C. § 1437c(a)(2) (1996) (explaining the operation of ACCs). That changed.

Congress enacted NAHASDA in an attempt to consolidate low-income housing assistance for Indian tribes and simplify the distribution of funds. NAHASDA terminated the housing assistance programs established under the Housing Act of 1937 and created a new system.[3] This new method of distributing funds sought to "[recognize] the right of Indian self-determination and tribal self-governance by making such assistance available directly to the Indian tribes or tribally designated entities . . ." 25 U.S.C. § 4101(7). This new system required the distribution of appropriated funds through annual block grants to individual housing entities for the purpose of carrying out affordable housing activities. 25 U.S.C. § 4111

Congress directed HUD to establish an allocation formula for this new system to reflect the need of the Indian tribes in the distribution of appropriated funds through block grants. 25 U.S.C. § 4152(a).[4] It specifically described the intended structure of the formula:

The formula shall be based on factors that reflect the need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities, including the following factors:

> (1) The number of low-income housing dwelling units owned or operated at the time pursuant to a contract between an Indian housing authority for the tribe and the Secretary.
>
> (2) The extent of poverty and economic distress and the number of Indian families within Indian areas of the tribe.

> (3) Other objectively measurable conditions as the Secretary and the Indian tribes may specify.

25 U.S.C. § 4152(b).[5]

Congress also required the regulations be crafted through a negotiated rulemaking process that involved interested Indian tribes. 25 U.S.C. § 4116. The negotiated rulemaking committee included fifty-eight members. Forty-eight of these members represented "geographically diverse small, medium and large Indian tribes." 62 Fed. Reg. 35,719. This committee was larger "than usually chartered under the Negotiated Rulemaking Act" because of "the diversity of tribal interests, as well as the number and complexity of the issues involved." *Id.* It operated solely by consensus and HUD agreed to use all of the committee consensus decisions, to the extent allowable under the law, as the basis for the proposed rulemaking. *Id.* at 35,719-20. The committee crafted a number of factors for the block grant formula, including the factor at issue in this appeal, which HUD considered when it adopted the final regulations.

The block-grant formula was included in the final regulations and codified at 24 C.F.R. §§ 1000.304-1000.340. It included two separately calculated components: 1) "Formula Current Assisted Housing Stock" units (current units); n6 and 2) "Need."[7] 24 C.F.R. § 1000.310. In accordance with the formula, to determine the amount of funding a Tribal Housing Entity would receive in a particular fiscal year, HUD first calculated the number of current units owned or operated by each Tribal Housing Entity and earmarked funds from the total appropriation to fund them.[8] The

current need portion for each Tribal Housing Entity was then established by applying preset weighted criteria to the remaining amount of appropriated funds. Because the funds earmarked for the current unit portion of the formula directly reduced the amount of funding available for current need disbursement, the current units component was of primary importance to Tribal Housing Entities. A larger number of current units funded in a particular fiscal year decreased the funds available for the current needs of all Tribal Housing Entities.

The current units calculation for an individual Tribal Housing Entity began with the number of dwelling units owned or operated by that entity at the time of NAHASDA's enactment. *Id.* Over the years, some rent-to-own units became eligible to be transferred from a Tribal Housing Entity's inventory or be otherwise disposed of due to the terms of a contract between the Tribal Housing Entity and the unit's occupant. For instance, a lease-to-own agreement between a Tribal Housing Entity and a low-income family may terminate in a given year and title to the residence would be transferred accordingly. Reflecting [*11] this reduction, HUD included a downward adjustment in the current units calculation. This adjustment was equal to the number of dwelling units a tribe "no longer has the legal right to own, operate, or maintain . . . whether such right is lost by conveyance, demolition, or otherwise." 24 C.F.R. § 1000.318(a). Units are to be removed from a Tribal Housing Entity's inventory "as soon as practicable after the unit becomes eligible for conveyance." 24 C.F.R. § 1000.318(a)(1). In determining the number of these disqualified units, HUD relied on information provided by the individual

Tribal Housing Entities on annual "Formula Response Forms." 24 C.F.R. § 1000.312.

B. Relevant Factual History

HUD's Inspector General conducted a nation-wide audit in 2002. This included seventeen on-site visits to Tribal Housing Entities across the nation. At five of the Tribal Housing Entities, it evaluated the accuracy of the current units reported on the Formula Response Forms. The audit revealed some Tribal Housing Entities owned or operated fewer dwelling units than they had reported on their Formula Response Forms and were receiving funds for dwelling units they no longer owned or operated. Those findings prompted a nation-wide audit, which showed Fort Peck, and other Housing Entities not relevant to this appeal, had made the same reporting mistake in fiscal years 1997-2003. HUD demanded a refund of these alleged overpayments.

Fort Peck initially refunded a portion of the alleged overpayments but later refused to continue repayment and instead contested the validity of 24 C.F.R. § 1000.318. It argued NAHASDA's plain language required HUD to continue funding at the 1997 level in the current units portion of the formula. In support of this argument, it stressed Congress's language that the formula "shall be based on . . . [t]he number of low-income housing dwelling units owned or operated at the time," meaning all dwelling units owned or operated in 1997 under 25 U.S.C. § 4181(a). (Appellant's Supp. Appx. at 61.) It asserted HUD's disqualification of units under 24 C.F.R. § 1000.318 violated Congress's

expressed intent in § 4152(b)(1). Fort Peck asserted the monies it had refunded to HUD must be returned.

HUD maintained Congress's intent in NAHASDA was to fund all tribal housing projects according to their relative need. It reasoned that a Tribal Housing Entity's need is reduced when dwelling units pass from its control or ownership. *See* 24 C.F.R. § 1000.318 (dwelling units cease to qualify as a current unit when a Tribal Housing Entity "no longer has the legal right to own, operate, or maintain the unit"); *see also* 63 Fed. Reg. 12,334, 12,343 (Mar. 12, 1998). n9 It explained the regulation followed Congress's express direction and intent because the reduction set forth in § 1000.318 was created through a negotiated rulemaking process and was an objectively measurable condition.

After exhausting the agency appeal process, Fort Peck brought suit in federal court challenging HUD's final determination. In relevant part, it claimed: (1) § 1000.318 was contrary to the statutory language in NAHASDA and HUD's conclusions to the contrary should be overturned; (2) HUD had no authority to seek further refund for overpayment; and (3) the district court should order HUD to return all payments already made.'

The district court concluded HUD unlawfully deprived Fort Peck of block-grant funding by improperly removing conveyed properties from the formula. *Fort Peck Housing Auth. v. United States Dept. of Housing & Urban Dev.*, 435 F. Supp. 2d 1125, 1132 (D. Colo. 2006). It determined the plain language of § 4152(b)(1) created a minimum or "floor" of dwelling units to be funded and § 1000.318 violated this requirement. *Id.* In

support of this conclusion, the court stressed that 25 U.S.C. § 4181(a) requires any housing formerly funded under the programs established by the 1937 Housing Act "shall, for the following fiscal year and each fiscal year thereafter, be considered a dwelling unit under § 4152(b)." *Id.* at 1133. The district court concluded "[t]he statute leaves no room for the formula to include some, but not all of the number of [1997 units]" because Congress limited agency discretion when it required HUD "shall" use the "definitive" number of 1997 units. *Id.* at 1132.

It further reasoned that even if the statute was ambiguous, deference must be given to Fort Peck's reasonable interpretation of the statute because statutes are to be construed liberally to benefit Indian tribes. *Id.* at 1134. It determined that Fort Peck's interpretation is consistent with NAHASDA's purposes and encouraged the building of new homeownership units which would otherwise not be funded. *Id.* The court considered HUD's regulation to be fundamentally unfair to Housing Entities with large numbers of homeownership units who "suffer decreases in their share of the annual apportionment" as units are conveyed while "tribes with a large percentage of rental units receive a greater share each year."[10] *Id.* at 1133. Finally, the district court concluded Fort Peck's position furthered NAHASDA's goals of self-governance and self-determination by eliminating many bureaucratic burdens and removing HUD's paternalistic oversight of whether units should be conveyed or participants evicted. *Id.* at 1134-35.

For these reasons the district court invalidated 24 C.F.R. § 1000.318 and ordered HUD "take such

administrative action as necessary to implement [its] ruling." Id. at 1136. In response to a Rule 59(e) motion by Fort Peck n11 requesting return of the partial refund of alleged overpayments, the court refused to order such return because these funds had already been distributed to other Housing Entities, making the issue moot. *Fort Peck Housing Auth. v. United Stated Dept. of Housing & Urban Dev.*, No. 05-CV- 00018, 2006 U.S. Dist. LEXIS 53203, 2006 WL 2192043 at *1 (D. Colo. Aug. 1, 2006). Instead, it ordered HUD to "take whatever action may be appropriate within its regulatory authority to adjust for its errors in computing [Fort Peck's] entitlement . . . ." 2006 U.S. Dist. LEXIS 53203, [WL] at *2.

II.

We exercise jurisdiction under the Administrative Procedures Act (APA) and consider whether the HUD's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). Our review is *de novo* for agency action under the Administrative Procedure Act. *Defenders of Wildlife v. United States Envtl. Protection Agency*, 415 F.3d 1121, 1126 (10th Cir. 2005). We afford the district court's decision no particular deference. *See Santa Fe Energy Prods. Co. v. McCutcheon*, 90 F.3d 409, 413 (10th Cir. 1996).

"An agency's rulemaking power is not the power to make law, it is only the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Sundance Assocs., Inc. v. Reno*, 139 F.3d 804, 808 (10th Cir. 1998) (quotation omitted). Statutory interpretation begins with the words Congress has

chosen. The inquiry ends if that language is clear. We merely enforce the statute's plain meaning. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997). But if an ambiguity confuses the statute's meaning, or irrational results arise from the statute's literal wording, we apply additional interpretive tools to ascertain and give effect to Congress's intent. *See, e.g., Exxon Mobil Corp. v. Allapattah Servs. Inc.*, 545 U.S. 546, 568, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005) ("Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms."); *Carter v. United States*, 530 U.S. 255, 267, 120 S. Ct. 2159, 147 L. Ed. 2d 203 (2000) ("[T]he title of a statute is of use only when it sheds light on some ambiguous word or phrase in the statute itself.") (quotations and alterations omitted). Such tools include consideration of the statute's history and purpose as well as statutory canons of construction. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

A. Statutory Interpretation

The parties agree NAHASDA required HUD to create and implement the block-grant formula. They also agree Congress set forth criteria to act as the formula's basis and allowed HUD to identify other criteria. This authorizing language was plain and required the formula be based on factors which reflect "the need of

the Indian tribes . . . for assistance for affordable housing activities." 25 U.S.C. § 4152(b). The parties disagree about the amount of discretion Congress gave HUD regarding the formula's creation. The words of Congress are our best guide. Those words explicitly list two factors -- the number of 1997 dwelling units and the extent of current need -- and a third factor allowing further identification of "[o]ther objectively measurable conditions as the Secretary and the Indian tribes may specify." 25 U.S.C. §§ 4152(b)(1)-(3).

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[12] *Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007) (internal citation and quotations omitted). Here, NAHASDA requires the formula be "based on" three factors. As used within § 4152(b) where Congress explicitly allowed for further definition of factors by HUD, the phrase "based on" is not synonymous with "equal to." *See Sierra Club v. EPA*, 356 F.3d 296, 306, 360 U.S. App. D.C. 1 (D.C. Cir. 2004) (the term "based on" is ambiguous and does not require the agency's findings rest solely upon a particular model); *McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1111 (9th Cir. 2000) ("based on" may be reasonably interpreted as indicating a "starting point" or "foundation"). Applying the ordinary definition of "based on" means the factors form the basis, beginning, or starting point, of the formula. *See United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir. 1994) ("'To 'base upon' means to 'use as a basis for.'" (citing Webster's Third New Int'l Dictionary 180 (1986))).[13]

Congress amended § 4181 of NAHASDA in 2000. This amendment required "[a]ny housing that is the subject of a contract for tenant-based assistance between the Secretary and an Indian housing authority that is terminated under this section shall, for the following year and each fiscal year thereafter, be considered a dwelling unit under section 4152(b)(1)." 25 U.S.C. § 4181(a). Fort Peck asserts this amendment supports the district court's conclusion that the downward adjustment in 24 C.F.R. § 1000.318 violated NAHASDA's purpose of requiring the 1997 units act as the basis for the block grant formula. 435 F. Supp. 2d at 1133-34. This is incorrect. The amendment did not require the funding of these dwelling units in perpetuity, nor did it require any other alteration of how HUD had interpreted the statute in its regulatory program. It only required the terminated housing be considered a dwelling unit under § 4152(b)(1) and included as part of the block grant formula's basis -- no more. It did not remove or amend the other two factors of § 4152(b) which also formed the basis for the block grant formula, nor did it limit HUD's discretion to include other objectively measurable conditions in the formula according to § 4152(b)(3). Because HUD included all terminated housing in § 4152(b)(1), it satisfied the requirement of § 4181(a).

HUD incorporated the units required by § 4152(b)(1) when it used all of the 1997 dwelling units as the starting point for the allocation formula. However, this number was but one factor required to meet the statute's overarching mandate that the formula "reflect the need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities." 25 U.S.C. § 4152(b). HUD's adjustment from the

number required by § 4152(b)(1) and § 4181 is of no concern because the adjustment was accomplished through "other objectively measurable conditions" that reflected the need of the Indian tribes in accordance with § 4152(b)(3). Congress's explicit direction allowed for this result. It required the funding be tied to the need of the tribes and granted the negotiated rulemaking committee the authority to craft criteria for inclusion in the formula. HUD determined the funding of units no longer owned or operated by a Tribal Housing Entity decreased the amount of remaining funds available to fund the current need of all tribal programs. Thus, it incorporated a corresponding reduction in the current units portion of the formula funding and effectively increased the amount of funding available for the current need portion of the formula. Interpreting § 4152(b)(1) to prohibit a reduction in the number of current units corresponding to a measurable reduction in responsibility by the Tribal Housing Entity for those units is inconsistent with the statute's plain language and is contrary to Congress's unambiguous intent that the funding formula relate to the needs of all tribal Housing Entities *See* 25 U.S.C. § 4152.

While we appreciate the district court's concern with the decreased allocation to entities that chose home-ownership over rental programs, its literal reading of the statutory language conflicts with the plain language of the statute viewed as a whole. The district court was without the benefit of our recent holding in *United Keetoowah Band of Cherokee Indians v. Department of Housing and Urban Development*, 567 F.3d 1235, 1241 (10th Cir. 2009). Therein, we considered whether HUD's regulation imposing a jurisdictional-based factor

for funding eligibility was contrary to its authority under the statute. Holding in the affirmative, we stated § 4152(b) "explicitly and unambiguously mandates that the factors in HUD's allocation formula reflect -- in other words, have some connection or nexus with -- the needs of Indian tribes and Indian areas of the tribes. The language does not permit any other reading." *Id.* The same reasoning applies equally here. An interpretation of the formula requirement in NAHASDA that requires a perpetual funding "floor" does not reflect Congress's unambiguous intent that the formula be related to the need of all tribal Housing Entities. Where Congress has expressed its intent, we are bound to give effect to that intent. *Osborne v. Babbitt*, 61 F.3d 810, 812 (10th Cir. 1995).

B. Agency Rulemaking

Having determined the plain language of the statute did not set a funding floor based upon the 1997 units, we consider whether the regulation comported with the statutory requirement that the formula relate to the need of the Housing Entities. Congress authorized broad agency authority when it delegated responsibility for creation of the block-grant formula to HUD. 25 U.S.C. § 4152(a). This broad authority, however, was limited by the requirement the formula have a "nexus with" the needs related to assistance for affordable housing activities. *United Keetoowah*, 567 F.3d at 1241; *see also* 25 U.S.C. § 4152(b).

We review agency rulemaking with great deference when a challenged decision involves matters within the agency's area of expertise. *Utah Envtl. Congress v.*

Bosworth, 443 F.3d 732, 739 (10th Cir. 2006). Here, the disbursement of funds for low-income housing assistance for Indian tribes was certainly within HUD's expertise: its institutional experiences in implementing the Housing Act of 1937, including the low-income housing programs for Indian tribes which NAHASDA replaced, justify our deference here. Congress not only identified specific factors to serve as the formula's basis but also required cooperation with tribal representatives in finalizing the formula. *See* 25 U.S.C. § 4116. This required participation supplemented HUD's institutional knowledge and expertise.[4]

HUD's regulation complied with the mandate set forth in NAHASDA and clearly included the entire (b)(1) factor as the starting point. *See* 24 C.F.R. §§ 1000.316(a)(1)-(3) (including all of the 1997 units). From this initial number, the formula offset the 1997 units by a definitive number of units as of a definitive date. 24 C.F.R. §§ 1000.316-1000.318. This number reflected the factors explicitly required by §§ 4152(b)(1)-(3). A reduction equal to the number of dwelling units no longer owned or operated by a Tribal Housing Entity recognized the ongoing and evolving needs of Tribal Housing Entities. NAHASDA clearly required interplay between all three factors in the determination of a Tribal Housing Entity's need, including those HUD identified in the rulemaking process. Section 1000.318's downward adjustment was an example of this interplay. It was not arbitrary or capricious.

Finally, Fort Peck asserts even if the regulations are reasonable, we must nonetheless reject them and defer to its interpretation of NAHASDA because "statutes are to be construed liberally in favor of Indians, with

ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985). Because NAHASDA was unambiguous and the final regulations were properly promulgated within NAHASDA's mandate, we need not address this issue except to note the canon cited does not allow a court to rob Peter to pay Paul no matter how well intentioned Paul may be. The statute was not ambiguous and HUD's regulation dispersed block-grant funding in such a way as to meet the current needs of all tribes.

We DENY the motion for leave to file a brief as amicus curiae submitted by other Housing Entities as untimely, REVERSE the district court's invalidation of 24 C.F.R. § 1000.318, REMAND for action consistent with this Order and Judgment, and DISMISS Fort Peck's cross-appeal.[1]

Entered by the Court:

Terrence L. O'Brien

United States Circuit Judge

Footnotes

[1]This order and judgment is an unpublished decision, not binding precedent. 10th Cir. R. 32.1(A). Citation to unpublished decisions is not prohibited. Fed. R. App. 32.1. It is appropriate as it relates to law of the case, issue preclusion and claim preclusion. Unpublished decisions may also be cited for their persuasive value. 10th Cir. R. 32.1(A). Citation to an order and judgment

must be accompanied by an appropriate parenthetical notation B (unpublished). *Id.*

[*]This order and judgment is an unpublished decision, not binding precedent. 10th Cir. R. 32.1(A). Citation to unpublished decisions is not prohibited. Fed. R. App. 32.1. It is appropriate as it relates to law of the case, issue preclusion and claim preclusion. Unpublished decisions may also be cited for their persuasive value. 10th Cir. R. 32.1(A). Citation to an order and judgment must be accompanied by an appropriate parenthetical notation B (unpublished). *Id.*

1Congress has since amended NAHASDA, including the statutory provisions at issue here. *See* Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, Pub. L. No. 110-411, 122 Stat. 4319 (2008). This Order and Judgment only considers the 2002 version of NAHASDA.

2 NAHASDA's effective date was October 1, 1997. P.L. 104-330, Tit. I, § 107, 110 Stat. 4030 (1996).

3HUD identified programs terminated by NAHASDA in the "Statutory Background" section of its proposed rule. *See* Implementation of the Native American Housing Assistance and Self-Determination Act of 1996, Proposed Rule, 62 Fed. Reg. 35,718, 35,719 (July 2, 1997)

4 The full text of the statute is reproduced as Appendix A to this Order and Judgment.

5In addition to the factors specified in § 4152(b)(1)-(3), Congress required consideration of two other factors:

> In establishing the formula, the Secretary shall consider –
>
> (1) the relative administrative capacities and other challenges faced by the recipient, including, but not limited to geographic distribution within the Indian area and technical capacity; and
>
> (2) the extent to which terminations of assistance under subchapter V of this chapter will affect funding available to State recognized tribes.

25 U.S.C. § 4152(c). Subsection (c)(1) is addressed in the regulations at 24 C.F.R. § 1000.538 which allows HUD to provide technical assistance if the Housing Entity's inability to comply with NAHASDA provisions is not due to willful noncompliance. Subsection (c)(2) references the termination of the housing assistance provided under the Housing Act of 1937 and is addressed at 24 C.F.R. § 1000.312 where HUD includes the 1937 programs in the definition of current units. HUD addressed these factors within its regulations. Neither party raised the section in their briefs, so we do not consider them further.

6 Formula Current Assisted Stock is defined by regulation to include all dwelling units owned or operated by an entity as of September 30, 1997, and limited other units. 24 C.F.R. § 1000.314. This definition was the starting point in determining current units. Subsequent regulations, including § 1000.318, identified when Formula Current Assisted Stock became ineligible for purposes of the block grant formula.

7The criteria for determining need, each weighted differently, include: (1) American Indian and Alaskan Native (AIAN) households with housing cost burden greater than 50% of "formula area income;" (2) AIAN households that are overcrowded or without kitchen or plumbing; (3) AIAN housing shortage; (4) AIAN households with income less than or equal to 30% of "formula median income;" (5) AIAN households with income between 30% and 50% of "formula median income;" (6) AIAN households with income between 50% and 80% of "formula median income;" and (7) AIAN persons. 24 C.F.R. § 1000.324.

8*See* Appendix A to Part 1000 -- Indian Housing block grant Formula Mechanics HUD, Nos. 5-6; *see also* 24 C.F.R. § 1000.324.

9One public comment to the proposed rule suggested conveyed units should qualify as current units if the unit is a part of a "five-year Comp Grant plan." HUD rejected this suggestion stating "a conveyed unit, because it has become a private home, does not qualify as [a current unit]." 63 Fed. Reg. at 12,343.

10HUD's regulations allowed inclusion of certain dwelling units that Tribal Housing Entities had plans to purchase or construct in 1997 in its initial computation of current units. The regulations do not allow for inclusion of other units which have been built or purchased by a Tribal Housing Entity since that time. 24 C.F.R. § 1000.312.

11Both parties filed motions under Fed. R. Civ. P. 59(e) to alter or amend the original judgment. HUD requested clarification of the scope of the district

court's judgment and requested guidance as to whether administrative actions against other Tribal Housing Entities were included. The court modified its judgment to limit its holding to administrative action involving Fort Peck. Neither party appealed from this decision.

12The importance of context has been aptly illustrated by the Supreme Court, "the scope of what seems a precise technical chess instruction, such as 'you must place the queen next to the king,' varies with context, depending, for example, upon whether the instructor is telling a beginner how to set up the board or telling an advanced player how to checkmate an opponent." *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 127 S. Ct. 1534, 1546, 167 L. Ed. 2d 449 (2007).

13Even if Congress's use of the term "based on" creates some ambiguity, the term does not render NAHASDA's purpose or intent ambiguous.

14 The district court stated this participation of tribal representatives was "of no relevance." *Ft. Peck*, 435 F. Supp. 2d at 1134. It is true a rule developed through negotiated rulemaking shall not be "accorded any greater deference by a court than a rule which is the product of other rulemaking procedures." 5 U.S.C. § 570. However, this does not mean we ignore the forty-eight members of the negotiated rulemaking committee who represented a number of Indian tribes. These representatives had first-hand knowledge of factors helpful in identifying tribal need. We do not grant any greater deference to this regulation because tribal representatives were involved. We do recognize the import of their participation and insight just as we

recognize the value of public comments when we consider traditional rulemaking procedures.

15 Because HUD's actions did not violate Congress's mandate, the issues raised in Fort Peck's cross-appeal are moot.

APPENDIX A

25 U.S.C.A. § 4152

Effective: December 27, 2000

United States Code Annotated Currentness

Title 25. Indians

Chapter 43. Native American Housing Assistance and Self-Determination (Refs & Annos)

Subchapter III. Compliance, Audits, and, Report

§ 4152. Allocation formula

(a) Establishment

The Secretary shall, by regulations issued not later than the expiration of the 12-month period beginning on October 26, 1996, in the manner provided under section 4116 of this title, establish a formula to provide for allocating amounts available for a fiscal year for block grants under this chapter among Indian tribes in accordance with the requirements of this section.

(b) Factors for determination of need

The formula shall be based on factors that reflect the need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities, including the following factors:

(1) The number of low-income housing dwelling units owned or operated at the time pursuant to a contract between an Indian housing authority for the tribe and the Secretary.

(2) The extent of poverty and economic distress and the number of Indian families within Indian areas of the tribe.

(3) Other objectively measurable conditions as the Secretary and the Indian tribes may specify.

(c) Other factors for consideration

In establishing the formula, the Secretary shall consider--

(1) the relative administrative capacities and other challenges faced by the recipient, including, but not limited to geographic distribution within the Indian area and technical capacity; and

(2) the extent to which terminations of assistance under subchapter V of this chapter will affect funding available to State recognized tribes.

(d) Funding for public housing operation and modernization

(1) Full funding

(A) In general

Except with respect to an Indian tribe described in subparagraph (B), the formula shall provide that, if, in any fiscal year, the total amount made available for assistance under this chapter is equal to or greater than the total amount made available for fiscal year 1996 for assistance for the operation and modernization of public housing developed or operated pursuant to a contract between the Secretary and an Indian housing authority pursuant to the United States Housing Act of 1937 [42 U.S.C.A. § 1437 et seq.], the amount provided for such fiscal year for each Indian tribe for which such operating or modernization assistance was provided for fiscal year 1996 shall not be less than the total amount of such operating and modernization assistance provided for fiscal year 1996 for such tribe.

(B) Certain Indian tribes

With respect to fiscal year 2001 and each fiscal year thereafter, for any Indian tribe with an Indian housing authority that owns or operates fewer than 250 public housing units, the formula shall provide that if the amount provided for a fiscal year in which the total amount made available for assistance under this chapter is equal to or greater than the amount made available for fiscal year 1996 for assistance for the operation and modernization of the public housing referred to in subparagraph (A), then the amount provided to that Indian tribe as modernization assistance shall be equal to the average annual amount of funds provided to the Indian tribe (other than funds provided as emergency assistance) under the assistance program under section 14 of the United States Housing

Act of 1937 (42 U.S.C. 1437*l*) for the period beginning with fiscal year 1992 and ending with fiscal year 1997.

(2) Partial funding

The formula shall provide that, if, in any fiscal year, the total amount made available for assistance under this chapter is less than the total amount made available for fiscal year 1996 for assistance for the operation and modernization of public housing developed or operated pursuant to a contract between the Secretary and an Indian housing authority pursuant to the United States Housing Act of 1937 [42 U.S.C.A. § 1437 et seq.], the amount provided for such fiscal year for each Indian tribe for which such operating or modernization assistance was provided for fiscal year 1996 shall not be less than the amount that bears the same ratio to the total amount available for assistance under this chapter for such fiscal year that the amount of operating and modernization assistance provided for the tribe for fiscal year 1996 bears to the total amount made available for fiscal year 1996 for assistance for the operation and modernization of such public housing.

(e) Effective date

This section shall take effect on October 26, 1996.

CREDIT(S)

(Pub.L. 104-330, Title III, § 302, Oct. 26, 1996, 110 Stat. 4036; Pub.L. 106-568, Title X, § 1003(g), Dec. 27, 2000, 114 Stat. 2928; Pub.L. 106-569, Title V, § 503(f), Dec. 27, 2000, 114 Stat. 2964.)

HISTORICAL AND STATUTORY NOTES

References in Text

This chapter, referred to in subsecs. (a) and (d), was in the original "this Act", meaning the Native American Housing Assistance and Self-Determination Act of 1996, Pub.L. 104-330, Oct. 26, 1996, 110 Stat. 4016, as amended, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 4101 of this title and Tables.

Subchapter V of this chapter, referred to in subsec. (c)(2), was in the original "title V", meaning Title V of Pub.L. 104-330, Oct. 26, 1996, 110 Stat. 4041, as amended, which is classified principally to subchapter V of this chapter; see Tables for complete classification.

The United States Housing Act of 1937, referred to in subsec. (d)(1)(A), is Act Sept. 1, 1937, c. 896, as revised generally by Pub.L. 93-383, Title II, § 201(a), Aug. 22, 1974, 88 Stat. 653, which is classified principally to chapter 8 (section 1437 et seq.) of Title 42. For complete classification of this Act to the Code, see Short Title note set out under section 1437 of Title 42 and Tables.

"Section 14 of the United States Housing Act of 1937 (42 U.S.C. 1437*l*)", referred to in subsec. (d)(1)(B), was repealed by Pub.L. 105-276, Title V, § 522(a), Oct. 21, 1998, 112 Stat. 2564.

Codifications

Pub.L. 106-569 amended this section without any

reference to prior identical amendment by Pub.L. 106-568. See 2000 Amendments notes under this section.

Amendments

2000 Amendments. Subsec. (d)(1)(A). Pub.L. 106-569, § 503(f)(1), designated existing provisions as subpar. (A), added a heading thereto, and as so designated, substituted "Except with respect to an Indian tribe described in subparagraph (B), the formula" for "The formula".

Pub.L. 106-568, § 1003(g)(1), designated existing provisions as subpar. (A), added a heading thereto, and as so designated, substituted "Except with respect to an Indian tribe described in subparagraph (B), the formula" for "The formula". See Codifications note set out under this section.

Subsec. (d)(1)(B). Pub.L. 106-569, § 503(f)(2), added subpar. (B).

Pub.L. 106-569, § 1003(g)(2), added subpar. (B). See Codifications note set out under this section.

LIBRARY REFERENCES

American Digest System

Indians [key] 9.

Key Number System Topic No.209.

25 U.S.C.A. § 4152, 25 USCA § 4152

Current through P.L. 110-316 (excluding P.L. 110-234, 110-246, 110-289, 110-314, and 110-315) approved 8-14-08

Civil Action No. 05-cv 00018 RPM

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO FORT PECK HOUSING AUTHORITY, Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, ALPHONSO JACKSON, Secretary of Housing and Urban Development, and MICHAEL LIU, Assistant Secretary for Public and Indian Housing, Defendants.

June 30, 2006, Decided
June 30, 2006, Filed

Richard P. Matsch, Senior District Judge.

ORDER GRANTING DEFENDANTS' MOTION TO AMEND JUDGMENT

On June 9, 2006, the defendants moved to amend this Court's judgment entered on May 25, 2006, pursuant to the Memorandum Opinion and Order of May 25, 2006. In that Memorandum Opinion, this Court ordered that the findings and conclusions set forth in Assistant Secretary Liu's letter of March 24, 2004, are set aside and in the Judgment, declared 24 C.F.R. § 1000.318 invalid. The Court further directed that all Mutual Help and Turnkey units the plaintiff owned or operated pursuant to an Annual Contributions Contract as of September 30, 1997, must be included in the formula for determining its allocation of the annual Congressional appropriation for Indian Housing Block Grants. Finally,

the defendants were directed to take such administrative action as necessary to implement the ruling. The defendants' motion addresses the question of the scope of this Court's declaratory judgment and the extent of the requirement that the defendants take administrative action as necessary to implement the ruling. The defendants are in the process of allocating the appropriation for Indian Housing Block Grants for fiscal year 2006. It being the view of this Court that because this action was not certified as a class action and because other Indian tribes are not parties in this case and have had no opportunity to take a position with respect to the validity of the rule as it affects them, the Court's order does not extend beyond Fort Peck Housing Authority and the defendants' allocation as to it for the years in question, the current year and future years. It is therefore

ORDERED that the Judgment entered on May 25th, 2006, is modified to limit the requirement that the United States Department of Housing and Urban Development take such administrative action as necessary to implement the Court's ruling is limited to Fort Peck Housing Authority.

Dated: June 30, 2006

BY THE COURT:

s/ Richard P. Matsch

Senior District Judge

Civil Action No. 05-cv-00018 RPM-CBS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

FORT PECK HOUSING AUTHORITY,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ALPHONSO JACKSON, Secretary of Housing and Urban Development, and MICHAEL LIU, Assistant Secretary for Public and Indian Housing,
Defendants.

August 1, 2006, Decided
August 1, 2006, Filed

Richard P. Matsch, Senior District Judge.

ORDER DENYING PLAINTIFF'S RULE 59(e) MOTION

Pursuant to the Memorandum Opinion and Order of May 25, 2006, judgment entered on the same day declaring 24 C.F.R. § 1000.318 invalid, directing that all Mutual Help and Turnkey units owned or operated by Fort Peck Housing Authority (FPHA) pursuant to an Annual Contributions Contract as of September 30, 1997, must be included in the formula for determining its allocation of the annual Congressional appropriation for Indian Housing Block Grants, and ordering the defendants to take such administrative action as

necessary to implement the court's ruling.

On June 9, 2006, FPHA moved to alter or amend that judgment, or alternatively to clarify it pursuant to Rule 59(e), to grant its claim for a refund of $ 513,354.00 that FPHA paid to the Department of Housing and Urban Development (HUD) in 2002 in partial satisfaction of claims of overpayment of the plaintiff's entitlements to block grant funds between Fiscal Years (FY) 1998 and 2002. FPHA argues that this court has authority pursuant to 5 U.S.C. §§ 702 and 706 and 28 U.S.C. § 2202 to order the requested monetary relief.

The history of FPHA's payments to HUD and HUD's application of the $ 513,354.00 is described in the declaration of Jacqueline A. Kruszek, a HUD employee who works as a Grants Management Team Leader in the headquarters of Native American Programs, a component of HUD's Office of Public and Indian Housing. [1] Ms. Kruszek's declaration describes the dates and methods by which FPHA made two payments to HUD in 2002, in response to HUD's request for the return of monies which HUD considered to be grant overpayments. Kruszek dec. PP 4-5. The grant monies that FPHA returned to HUD in 2002 were treated as unobligated funds and were added to the FY 2003 appropriation for all tribes' block grants. *Id.* These funds, and similar funds received from other tribes, were distributed to the tribes for their housing needs with the funds from the FY 2003 appropriation. *Id.*

The defendants responded contending that this court has no authority to grant monetary relief under the Administrative Procedure Act, 5 U.S.C. §§ 701-706

(APA) and the request raises a moot issue because the funds received from FPHA were distributed to other tribes as part of the distribution of funds appropriated for block grants for FY 2003. The defendants further contend that granting the request for payment would violate the Appropriations Clause in Art. I, § 9, cl. 7 of the United States Constitution. Finally, HUD argues that the plaintiff has an adequate remedy with the meaning of 5 U.S.C. § 704 in the Court of Federal Claims.

The mootness argument is dispositive of this motion. It is supported by precedent, particularly *City of Houston v. Dep't of Hous. & Urban Dev.*, 306 U.S. App. D.C. 313, 24 F.3d 1421 (D.C. Cir. 1994). Additional support is found in *Population Inst. v. McPherson*, 254 U.S. App. D.C. 395, 797 F.2d 1062, 1081 (D.C. Cir. 1986); *West Virginia Asso. of Community Health Centers, Inc. v. Heckler*, 236 U.S. App. D.C. 287, 734 F.2d 1570, 1576-77 (D.C. Cir. 1984); *Ambach v. Bell*, 222 U.S. App. D.C. 348, 686 F.2d 974, 986 (D.C. Cir. 1982).

The relief requested is not an available remedy under the APA because it constitutes money damages contrary to the restriction in 5 U.S.C. § 702. The plaintiff relies on *Bowen v. Massachusetts*, 487 U.S. 879, 108 S. Ct. 2722, 101 L. Ed. 2d 749 (1988) as authority for its contention that the refund would not be money damages because HUD's calculation of overpayment was based on an invalid regulation. FPHA claims that it is entitled to the amounts it received under the proper formula and it is therefore in a position analogous to that of the Massachusetts Department of Public Welfare in *Bowen*. The analogy is not apt because the funds repaid have been re-distributed and, accordingly,

the order requested would be "substitute relief" within the distinction drawn by the Supreme Court in *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 262, 119 S. Ct. 687, 142 L. Ed. 2d 718 (1999). Payment to FPHA of the amount requested must come from a source of funds other than the appropriations made for the fiscal years in issue in this case.

The alternative relief requested by the plaintiff is a direction to HUD "to take such administrative action as necessary to implement the court's ruling" to specifically direct that the overpayment be refunded. That is not different from a money judgment in its effect. This court's intention in directing further administrative action was and is that HUD take whatever action may be appropriate within its regulatory authority to adjust for its errors in computing the FPHA entitlement for the years FY 1988 through FY 2002 using current funds appropriated and undistributed for housing block grants. The manner of such adjustments is with the agency's sound discretion.

Accordingly, its

ORDERED, that the plaintiff's Rule 59(e) motion is denied.

Dated: August 1, 2006

BY THE COURT:

s/ Richard P. Matsch

Senior District Judge

Footnote

1 Ms. Kruszek's declaration is Exhibit A-1 to defendants' response to the plaintiffs Rule 59(e) motion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch
Civil Action No. 05-cv-00018-RPM-CBS

FORT PECK HOUSING AUTHORITY,
Plaintiff,
v.
UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ALPHONSO JACKSON, Secretary of Housing and Urban Development, and MICHAEL LIU, Assistant Secretary for Public and Indian Housing.
Defendants.

MEMORANDUM OPINION AND ORDER
Matsch, Senior Judge

The plaintiff, Fort Peck Housing Authority ("FPHA"), is an agency of the federally recognized Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation. FPHA is authorized as a Tribally Designated Housing Entity ("TDHE") to receive annual block grant funds from the United States Department of Housing and Urban Development ("HUD") pursuant to the Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. § 4101 et seq. ("NAHASDA"), and administer those funds to provide affordable housing for low income families. FPHA brought this action for judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"), of HUD's determinations that FPHA has received excess block grant funding for the years 1998 through 2002 and that FPHA must repay the overfunded amounts.

The agency action under review is a letter dated March 26, 2004, from Assistant Secretary Michael Liu to counsel for FPHA. A.R. 531-534.[1] That letter incorporates a letter of January 3, 2003, from Rodger J. Boyd, Deputy Assistant Secretary for Native American Programs, outlining HUD's legal interpretation of the statutes and implementing regulations. A.R. 380-384. The core of the plaintiff's complaint is that the regulations conflict with the statute and are therefore invalid.

Before the enactment of NAHASDA, HUD provided funds to Indian housing authorities through a variety of programs under the United States Housing Act of 1937, 42 U.S.C. § 1437 et seq. HUD provided funding for low-rent housing projects and assistance to tenants under section 8 of that Act. See 42 U.S.C. § 1437f. HUD also provided assistance through programs designed to assist low-income Indian families in purchasing homes.

Under a homeownership program known as Mutual Help, an eligible Indian family could contribute land, work, cash, materials or equipment to the construction of a home under a Mutual Help and Occupancy Agreement with an option to purchase the home at the end of the contract period. See 24 C.F.R. Part 905, Subpart E (1995); see also Dewakuku v. Martinez, 271 F.3d 1031, 1034 (Fed. Cir. 2001) (describing the Mutual Help program and explaining that "the family enters into what is, in essence, a lease-purchase agreement, for a period of up to twenty-five years").

Another program designed to encourage homeownership was the Turnkey III Homeownership Opportunities program. Turnkey III was also a type of

lease-to-own program.

See 24 C.F.R. Part 905, Subpart G (1995); see also Michael H. Schill, Privatizing Federal Low Income Housing Asssitance: The case of Public Housing, 75 CORNELL L. REV. 878, 913-14 (May 1990) (explaining that the Turnkey III program "permitted tenants to purchase newly built public housing when their accumulated rent payments equalled the development cost of the unit or when they received sufficient mortgage financing"). HUD's regulations permitted conversion of either Turnkey III units or Mutual Help units into rental units. See 24 C.F.R. §§ 905.458, 905.503(a)(1995).

HUD's housing assistance to tribes under the 1937 Housing Act was provided through Annual Contributions Contracts ("ACC"). See 24 C.F.R. § 1000.10(b) (defining Annual Contributions Contract as "a contract under the 1937 Act between HUD and an IHA [Indian Housing Authority] containing the terms and conditions under which HUD assists the IHA in providing decent, safe, and sanitary housing for low-income families."). HUD awarded funds for each fiscal year in the specific amount set forth in the ACC for that year.

NAHASDA was enacted in 1996, and took effect on October 1, 1997. See Pub. L. 104-330, § 107, 110 Stat. 4016 (1996).[2] The legislative purpose of NAHASDA is articulated in the Congressional findings set forth in 28 U.S.C. § 4101:

> (1) the Federal Government has a responsibility to promote the general welfare of the Nation–

(A) by using Federal resources to aid families and individuals seeking affordable homes in safe and healthy environments and, in particular, assisting responsible, deserving citizens who cannot provide fully for themselves because of temporary circumstances or factors beyond their control;

(B) by working to ensure a thriving national economy and a strong private housing market; and

(C) by developing effective partnerships among the Federal Government, State, tribal, and local governments, and private entities that allow government to accept responsibility for fostering the development of a healthy marketplace and allow families to prosper without government involvement in their day-to-day activities;

(2) there exists a unique relationship between the Government of the United States and the governments of Indian tribes and a unique Federal responsibility to Indian people;

(3) the Constitution of the United States invests the Congress with plenary power over the field of Indian affairs, and through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indian people;

(4) the Congress, through treaties, statutes, and the general course of dealing with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes and for working with tribes and their members to

improve their housing conditions and socioeconomic status so that they are able to take greater responsibility for their own economic condition;

(5) providing affordable homes in safe and healthy environments is an essential element in the special role of the United States in helping tribes and their members to improve their housing conditions and socioeconomic status;

(6) the need for affordable homes in safe and healthy environments on Indian reservations, in Indian communities, and in Native Alaskan villages is acute and the Federal Government should work not only to provide housing assistance, but also, to the extent practicable, to assist in the development of private housing finance mechanisms on Indian lands to achieve the goals of economic self-sufficiency and self-determination for tribes and their members; and

(7) Federal assistance to meet these responsibilities should be provided in a manner that recognizes the right of Indian self-determination and tribal self-governance by making such assistance available directly to the Indian tribes or tribally designated entities under authorities similar to those accorded Indian tribes in Public Law 93-638 (25 U.S.C. 450 et seq.).

NAHASDA terminated Indian housing assistance under the 1937 Housing Act after September 30, 1997, see 25 U.S.C. §§ 4181(1), 4182, and provided for annual block grants on behalf of Indian tribes in amounts to be determined by an allocation formula to be established by regulations issued according to a negotiated

rulemaking procedure. See 25 U.S.C. §§ 4151, 4152, 4116. NAHASDA provides that HUD shall make grants on behalf of Indian tribes to carry out affordable housing activities for each fiscal year from an appropriation for that year for tribes that have submitted an Indian housing plan, meeting general statutory requirements, including a statement of needs of low-income Indian families residing in the jurisdiction of the tribes. 25 U.S.C. §§ 4111, 4112. The tribes may delegate authority to a tribally designated housing entity.

The plaintiff was so designated by the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation. Affordable housing activities eligible for funding are described in § 4132 as activities "to develop or to support affordable housing for rental or homeownership." Congress directed HUD to establish a formula to provide for allocating the annual appropriation among Indian tribes by regulations, using the negotiated rulemaking procedure authorized by the Administrative Procedure Act, 5 U.S.C. §§ 561-567. The formula to be developed by that process must be in accordance with the statutory requirements of 25 U.S.C. § 4152(b), as follows:

The formula shall be based on factors that reflect the need of the Indian tribes and the areas of the tribes for assistance for affordable housing activities, including the following factors:

> (1) The number of low-income housing dwelling units owned or operated at the time pursuant to a contract between an Indian housing authority for the tribe and the Secretary.

(2) The extent of poverty and economic distress and the number of Indian families within Indian areas of the tribe.

(3) Other objectively measurable conditions as the Secretary and the Indian tribes may specify.

A committee composed of forty-eight representatives of Indian tribes and ten HUD representatives developed the formula in the regulations relied on by HUD in making the decision under review. See "Implementation of the Native American Housing Assistance and Self-Determination Act of 1996; Final Rule," 63 Fed. Reg. 12,334 (March 12, 1998). The regulations are found in Part 1000, Subpart D, of Title 24 of the Code of Federal Regulations. 24 C.F.R. §§ 1000.301 to 1000.340.

The formula has two components: (1) Formula Current Assisted Stock ("FCAS") and (2) need. 24 C.F.R. § 1000.310.[3] The FCAS component is based on a tribe's inventory of low-income housing units, which may include low-rent units, Mutual Help and Turnkey III units. See §§ 1000.310; 1000.312, and 1000.314 The FCAS component is calculated by multiplying each type of unit in a tribe's housing inventory by a subsidy factor. See § 1000.316. The need component is based on seven criteria, including information derived from census data, such as the number of households in a tribe's population with income below a median income level, and the number of households living without kitchens and plumbing. See §1000.324. Generally, the amount of annual funding for an Indian tribe is the sum of the FCAS component and the need component, which is subject to a minimum funding amount. See § 1000.328.

The focus of the present dispute is on the FCAS component of the formula. The regulations provide that the starting point for calculating the FCAS is "Current Assisted Stock," which is the number of housing units for which a tribe was receiving HUD assistance on NAHASDA's effective date, October 1, 1997:

> Current assisted stock consists of housing units owned or operated pursuant to an [Annual Contributions Contract]. This includes all low rent, Mutual Help, and Turnkey III housing units under management as of September 30, 1997, as indicated in the Formula Response Form.

§ 1000.312. Under the formula, units that "were in the development pipeline" as of 1997, and units for which a tribe was receiving assistance under section 8 of the 1937 Housing Act when their current contract expires and the Indian tribe continues to manage the assistance in a manner consistent with the Section 8 program are included in FCAS. § 1000.314. Section 1000.318 answers the question, "When do units under Formula Current Assisted Stock cease to be counted or expire from the inventory used for the formula?" That regulation reads as follows:

> (a) Mutual Help and Turnkey III units shall no longer be considered Formula Current Assisted Stock when the Indian tribe, TDHE [tribally designated entity], or IHA [Indian Housing Authority] no longer has the legal right to own, operate, or maintain the unit, whether such right is lost by conveyance, demolition, or otherwise, provided that:

(1) Conveyance of each Mutual Help or Turnkey III unit occurs as soon as practicable after a unit becomes eligible for conveyance by the terms of the MHOA [Mutual Help Occupancy Agreement]; and

(2) The Indian tribe, TDHE, or IHA actively enforce strict compliance by the homebuyer with the terms and conditions of the MHOA, including the requirements for full and timely payment.

(b) Rental units shall continue to be included for formula purposes as long as they continue to be operated as low income rental units by the Indian tribe, TDHE, or IHA.

(c) Expired contract Section 8 units shall continue as rental units and be included in the formula as long as they are operated as low income rental units as included in the Indian tribe's or TDHE's Formula Response From.

As discussed above, a Mutual Help Occupancy Agreement ("MHOA") is a lease with an option to purchase contract. The term of a MHOA generally is not more than 25 years, and at the end of the term, the homebuyer may exercise the purchase option by paying any remaining balance of the purchase price, plus any closing or settlement costs. See A.R., Attachment 3, "Fort Peck Housing Authority Homeownership and Rental Program Admissions and Occupancy Policy, dated May 10, 2001," at 24-30.

HUD initiates the annual allocation process by sending a "Formula Response Form" to the tribes, indicating HUD's intended application of the formula to allocate the tribe's share of the appropriation for all participating tribes. See §§ 1000.302, 1000.332. The

tribe then may disagree in its response.

In October 1997, HUD sent FPHA a Formula Response Form that included HUD's records of the Mutual Help, Low Rent, Turnkey III, and Section 8 units at Fort Peck developed with funding under the 1937 Housing Act. A.R. 32-36. Formula Response Forms were sent for the succeeding years in the same manner, resulting in block grants to FPHA of between $5,000,000.00 and $ 6,000,000.00 for the years 1998, 1999, 2000, and 2001. A.R. 91; 115; 146, and 181.

In 2001, HUD's Office of Inspector General ("OIG") performed a nationwide audit of the NAHASDA program implementation. See Pl.'s ex. 1.[1] The OIG conducted site visits of seventeen tribally designated housing entities, other than FPHA. The OIG audit report contained the conclusion that Indian block grant funds had not been properly allocated in previous years because they were based on "housing units that do not qualify as FCAS."Id. at 4. The OIG criticized HUD for a failure to enforce compliance with 24 C.F.R. § 1000.318, saying: "Since Mutual Help and Turnkey III programs generally do not exceed 25 years, one can reasonably expect that some of these units should be paid-off, and the Housing Entities would no longer have the legal right to own, operate, or maintain these units." Pl.'s ex. 1 at 18. The OIG recommended that the Office of Native American Programs "audit all Housing Entities' FCAS, remove ineligible units from FCAS, recover funding from Housing Entities that had inflated FCAS and reallocate the recovery to recipients that were under funded," and "institute control procedures to insure FCAS accuracy for future years."Id.

In September 2001, HUD notified FPHA that it may have received overpayments. A.R. 215-216. HUD questioned the eligibility of 238 homeownership units that were included in the plaintiff's FCAS component for the years 1998, 1999, 2000 and 2001. HUD did not assert and has never contended that FPHA intentionally or fraudulently overstated its housing inventory on its Formula Response Forms. As previously stated, the plaintiff's housing inventory numbers in its Formula Response Forms for the years 1998 through 2001 were based on numbers provided by HUD.

By letters dated December 20, 2001, May 30, 2002, and July 31, 2002, HUD informed FPHA that FPHA had received overfunding for the fiscal years 1998 through 2002 in the amount of $1,767,276.00.[5] A.R. 239-242; 299-303, and 342-343. In 2002, FPHA submitted two payments to HUD totaling $513,354.00. See A.R. 354-355. On August 30, 2002, HUD notified FPHA that it still owed $1,253,922.00. A.R. 354-355.

On October 3, 2002, counsel for FPHA wrote to HUD, challenging HUD's determination that FPHA had received overpayments and requesting an opportunity to be heard. A.R. 370. Rodger J. Boyd, Deputy Assistant Secretary for Native American Programs, responded by letter dated January 3, 2003. A.R. 380-384. That letter explained HUD's policy with respect to § 1000.318. The Assistant Secretary characterized FPHA's challenge as a dispute over data and stated that such disputes are governed by procedures set forth in 24 C.F.R. §§ 1000.118 and 1000.336. Those procedures do not provide for a hearing.

Representatives of FPHA and HUD met on January 15, 2003, and continued to correspond about the tribes' FCAS inventory. See A.R. 390-393. From April 8 through April 10, 2003, HUD staff visited the Fort Peck Assiniboine and Sioux Tribes, and conducted an on-site review of the tribes' FCAS stock. In a letter to FPHA dated December 8, 2003, Deputy Assistant Secretary Boyd summarized the communications between HUD and FPHA regarding the overfunding dispute and set forth the results of the site visit. A.R. 490-504. During the site visit, FPHA was able to show that a number of units that were the subject of dispute should be retained in the tribe's FCAS inventory. This reduced the amount in dispute by $ 786,996.00. A.R. 497. HUD continued to assert that FPHA's housing inventory had been overstated for block grant purposes. HUD's position was that any Mutual Help unit not conveyed at the end of the initial amortization period could not be counted unless FPHA provided a satisfactory reason for the lack of conveyance. HUD refused to allow FPHA to retain units in its FCAS inventory by extending the repayment period for homebuyers who took over the payment schedules of previous homebuyers and excluded any unit with a "tenant account receivable" at the end of the period, unless a written repayment agreement was in place or eviction proceedings had been commenced. A.R. 494-495.

The Deputy Assistant Secretary's letter of December 8, 2003, stated that FPHA had received overfunding in the amount of $1,058,992 for fiscal years 1998-2003, and still owed $504,750.00. A.R. 498 and 515 (clarifying the amount). That letter states, "We will work with your Tribe to find a suitable way to structure repayment. This may involve reducing previous and/or future

year's funding." A.R. 498. The letter notified FPHA of its right to appeal in accordance with § 1000.336(b) and the appeal process outlined in § 1000.118. A.R. 498.

On January 12, 2004, FPHA's counsel wrote to the Deputy Assistant Secretary, challenging the agency's determination on three grounds. A.R. 509-513. FPHA argued (1) that HUD's interpretation of the block grant allocation formula conflicts with NAHASDA; (2) that in seeking repayment from FPHA, HUD did not follow the statutory procedures relating to adverse grant decisions, and (3) that HUD has no authority to recover block grant funds already awarded.

On March 26, 2004, Mr. Michael Liu, the Assistant Secretary for Public and Indian Housing, responded to FPHA's legal counsel and rejected those arguments. A.R. 531-534.

Mr. Liu's letter stated, "my office will continue to work with the Tribes and the [tribally designated housing entity] to establish a repayment schedule for the over-allocated funds." As previously stated, Mr. Liu's letter of March 26, 2004, is HUD's final decision under review in this action.

The plaintiff requests a judgment "declaring that all Homeownership units under an ACC as of September 30, 1997 must be included in the Plaintiff's FCAS." Compl. at 8 (Wherefore clause), ¶ 4. In the alternative, the plaintiff requests a judgment "declaring that all Homeownership units that have not been conveyed be included in Plaintiff's FCAS." Id. The plaintiff seeks injunctive relief "prohibiting Defendants from recapturing the disputed amounts by requiring

repayment, the reduction or limiting of future funding or any other means based on the disputed Mutual Help homes, and ordering the Defendants to refund the grant amounts it has recaptured."Id. ¶ 3.

In the exercise of jurisdiction granted by the APA, this court is to determine whether HUD's reduction of the FCAS component of the plaintiff's block grant funding for the years 1999-2002 was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

As previously discussed, the agency decision is based on § 1000.318 and that regulation conflicts with the plain language of 25 U.S.C. § 4152(b)(1), mandating the inclusion of "[t]he number of low-income housing dwelling units owned or operated at the time [September 30, 1997] pursuant to a contract between an Indian housing authority for the tribe and the Secretary."

"If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984). The text of the statute makes its meaning is clear. The use of that word "shall" limits the agency's discretion.

Congress expressly directed that the first factor in determining a tribe's need for housing assistance is the number of dwelling units for which a tribe was receiving federal assistance when NAHASDA went into effect. The use of the phrase "the number" is definitive. The statute leaves no room for the formula

to include some, but not all of the number of dwelling units that a tribe owned or operated pursuant to an ACC. For the purpose of determining a tribe's housing needs, the statute mandates that the number of dwelling units that a tribe owned or operated pursuant to an ACC is to be used in the formula, and that number is a floor. The direction to promulgate implementing regulations is to develop a workable method for quantifying the other factors to be considered under 25 U.S.C. § 4152(b)(2) and (3).

Section 1000.318 has the perverse effect of turning the number of housing units a tribe owned or operated pursuant to an ACC into a ceiling. Housing units that a tribe acquired or developed after September 30, 1997 (other than ones that were in the "development pipeline" as of that date) and paid for from NAHASDA funds cannot be included in the FCAS inventory. See §§ 1000.312; 1000.314, and 1000.322. The downward adjustment required by § 1000.318 means that a tribe's FCAS inventory decreases as homeownership units reach the end of the 25-year amortization period, but a tribe's FCAS inventory cannot remain at the 1997 level, even if the tribe builds or acquires new homeownership units to replace ones that have been demolished or conveyed.

The assumption inherent in the invalid regulation is that a tribe must evict the family living in a home ownership unit if they do not purchase their unit at the expiration of the 25 year term. That assumption ignores the requirements in the FPHA Homeownership and Rental Program Admissions and Occupancy Policy ("A & O Policy"), which was approved by HUD and adopted by the FPHA Board of

Commissioners.[6] The A & O Policy recognizes that homebuyers sometimes fall behind in making their payments, and to avoid evictions, the Policy allows payment agreements to be modified. See A & O Policy, §§ 10.d and e. If a homebuyer fails to pay amounts due on time, the housing authority may initiate the eviction process, but it must first terminate the MHOA, and that process requires the housing authority to give notice of the reasons for termination and provide the homebuyer with an opportunity to file a grievance. A & O Policy § 10.h. For homebuyers with delinquencies remaining after the expiration of the amortization period, the Policy allows the housing authority to extend the time for repayment of the remaining balance. A & O Policy § 9.d.v.(1).[7] Homebuyers who do pay the entire purchase price within the amortization period still must pay settlement costs to complete the purchase transaction, and upon conveyance, the homebuyers become responsible for costs and liabilities associated with ownership, including insurance, property taxes, and utilities. A & O Policy §§ 9.e and g. Some homebuyers are unable or reluctant to pay these additional expenses of homeownership. In some circumstances, the housing authority may agree to convert a Mutual Help unit to a low rent unit. A & O Policy § 9.m.

The housing needs of people living on an Indian reservation are not reasonably determined by a formula that depends upon whether the families in homeownership units purchase the property or the FPHA evicts them for failure to accept ownership. Section 1000.318 discourages the development of new units because new units developed with NAHASDA funds are not included in a tribe's FCAS inventory. See

§ 1000.322. If a tribe develops new homeownership units as old ones are conveyed or demolished, the tribe incurs costs associated with owning and operating such units, but the tribe cannot count the new units in the FCAS component.[8]

The downward adjustment to FCAS required by § 1000.318 operates to the detriment of tribes that have chosen to operate a large number of homeownership units. Tribes with many homeownership units suffer annual decreases in their FCAS components, whereas tribes whose housing activities are concentrated on operating rental units do not. As a result, tribes with large numbers of homeownership units suffer decreases in their share of the annual apportionment, and tribes with a large percentage of rental units receive a greater share each year. The proportion of homeownership and rental units are for the tribes to determine under the policy of self-determination.

The plaintiff's interpretation of 25 U.S.C. § 4152 is consistent with the last sentence of section 25 U.S.C. § 4181(a), which was added by amendment in 2000 and states:

> Any housing that is the subject of a contract for tenant-based assistance between the Secretary and an Indian housing authority that is terminated under this section shall, for the following fiscal year and each fiscal year thereafter, be considered a dwelling unit under section 4152(b) of this section.

"Tenant-based assistance" refers to rental assistance provided to tenants under subsection (o) of section 8 of

the 1937 Housing Act. See 42 U.S.C. § 1437f(o). That type of assistance is provided in the form of tenant subsidies, rather than through a subsidy for a specific building. See Baker v. Prop. Investors, 338 F. Supp.2d 321, 323 (D. Conn. 2004) (explaining the difference between "project-based" and "tenant-based" assistance under section 8 of the 1937 Housing Act). The purpose of the amendment was to remove any question about whether a "contract" for tenant-based assistance is the equivalent of a "dwelling unit" for purposes of 25 U.S.C. § 4152(b). Significantly, the amendment requires that housing that was the subject of tenant-based assistance is to be included in the formula in each fiscal year. The language of this amendment is consistent with the plain language of § 4152(b), showing that Congress intended for the allocation formula in each fiscal year to be based on " the number of low-income housing dwelling units" for which a tribe was receiving federal assistance when NAHASDA went into effect. Contrary to HUD's argument, the amendment does not show Congressional approval of those aspects of the regulatory scheme that were not amended. Section 4152(b) speaks of "dwelling units," and no clarification was required to bring homeownership units within the category of "dwelling units."

As HUD concedes, § 1000.318(a) is inartfully worded. The OIG's audit report in 2001 was the event that prompted HUD to reevaluate each tribe's FCAS. Indeed, the record shows that before the OIG conducted the audit, HUD had not questioned the eligibility of 25-year old homeownership units listed in FPHA's FCAS inventory, although the age of the units was apparent from the "date of full availability" column shown on the Formula Response Forms.

Section 1000.318 is invalid because it conflicts with 25 U.S.C. § 4152. The fact that the regulatory scheme was developed through a negotiated rulemaking procedure is of no relevance to this determination. Nor does it matter that the formula was not meant to be "set in stone," and was intended to be reviewed within the first five years. See § 1000.306. That time period has long since passed, and this action concerns the current formula.

The statute is not ambiguous, but even if there were any lack of clarity, the proper interpretation is one that benefits Indians. "[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985). Interpretation of the statute at issue in this case is governed by that canon of construction, and not by the rule favoring deference to the agency's interpretation. See Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1461-62 (10th Cir. 1997). When Congress enacted NAHASDA, it stated that "providing affordable homes in safe and healthy environments is an essential element in the special role of the United States in helping tribes and their members to improve their housing conditions and socioeconomic status. " 25 U.S.C. § 4101(4). Congress found that "the need for affordable homes and healthy environments on Indian reservations [and] Indian communities is acute."Id. § 4101(6). The plaintiff's interpretation is consistent with the goals of NAHASDA and benefits all tribes by setting a lower limit on each tribe's housing inventory to be counted for the formula. The plaintiff's interpretation treats all tribes in the same manner, regardless of how a tribe's housing inventory is

distributed between rental and homeownership units. Using a definitive number as a baseline also benefits the tribes by eliminating the bureaucratic burdens and confusion so apparent in this Administrative Record.

Furthermore, Indians benefit from an interpretation that does not discourage tribes from developing new homeownership units to replace older ones that have been demolished or conveyed. Section 1000.318 is not merely a slight imperfection in the regulatory scheme, it is a serious flaw that cannot be reconciled with the language of 25 U.S.C. § 4152(b). For the reasons set forth above, HUD's interpretation of 25 U.S.C. § 4152(b) is not reasonable and is not entitled to controlling weight. Section 1000.318 leads to funding allocations – with reductions to some tribes and windfalls to others – based on factors that are not related to tribal housing needs.

Even if the statute and the regulation could be reconciled, HUD's interpretation of § 1000.318 results in paternalistic oversight by that agency, contrary to the principles of Indian self-determination and self-governance that are key components of NAHASDA. See 25 U.S.C. § 4101(7). As set forth above, HUD interprets § 1000.318 (a)(1) and (2) to mean that a tribe is allowed to count homeownership units in its FCAS if the tribe still owns and operates the units, and so long as the tribe (1) is conveying units as soon as practicable after they become eligible for conveyance, and (2) is strictly enforcing its agreements with homebuyers. As discussed above, the plaintiff's A & O Policy sets forth collection procedures and procedures applicable to conveyance of homeownership units. HUD should defer to the FPHA's judgment, within the parameters

of that Policy, as to when eviction or conveyance is appropriate. Instead, HUD itself determines whether the tribe has conveyed such units "as soon as practicable," and whether the tribe is strictly enforcing its MHOAs. HUD's exercise of authority over this determination interferes with tribal management of tribal affairs. Notably, in response to the OIG audit report, the Deputy Assistant Secretary for Native American Programs protested the OIG's recommendation that HUD take a more active oversight role, explaining that the administration of the Indian Block Grant program should be accomplished "in a manner that recognizes the right of Indian self-determination and tribal self-governance." Id. at 21.

The plaintiff also contends that HUD's actions were taken without observance of the procedural requirements pertaining to NAHASDA compliance audits, and that HUD has no authority to recapture amounts from the the plaintiff that it has already spent on affordable housing activities. Having resolved the resolved the statutory interpretation issue in favor of the plaintiff, and having determined that 24 C.F.R. § 1000.318 is invalid, the court need not address the procedural issues addressed in the plaintiff's complaint and the briefs.

Based on the foregoing, it is

ORDERED that the findings and conclusions set forth in Assistant Secretary Liu's letter of March 24, 2004, are set aside; and it is

FURTHER ORDERED that judgment shall enter declaring 24 C.F.R. § 1000.318 invalid, and declaring

that all Mutual Help and Turnkey III units that the plaintiff owned or operated pursuant to an Annual Contributions Contract as of September 30, 1997, must be included in the formula for determining its allocation of the annual Congressional appropriation for Indian Housing Block Grants, and it is

FURTHER ORDERED that the defendants shall take such administrative action as necessary to implement this ruling.

Dated: May 25, 2006
BY THE COURT:
s/Richard P. Matsch
Richard P. Matsch, Senior District Judge

Footnotes

1 Documents included in the Administrative Record are Bates-stamped, and references are to the Bate-stamped page numbers. For example, A.R. 531 refers to the page in the record marked US 000531.

2 Section 107 states, "Except as otherwise expressly provided in this Act, this Act and the amendments made by this Act shall take effect on October 1, 1997. 110 Stat. 4016, 4030.

3 Hereinafter citations to section numbers refer to Title 24 of the Code of Federal Regulations, unless otherwise designated.

4 On December 28, 2005, the plaintiff submitted eight exhibits which are not part of the Administrative Record. The defendants consented to the court's

consideration of these exhibits. The supplemental exhibits are referenced by exhibit number and Bates-stamped page number.

5 In a later letter, HUD stated that "the May 30, 2002 correspondence summarized the total amount of overfunding that HUD sought to recover as $1,825,027 . . . ." A.R. 493.

6 The FPHA Admissions & Occupancy Policy, dated May 10, 2001, is Attachment 3 to the Administrative Record. Plaintiff's exhibits 4 and 5 are excerpts from revised versions of the A & O Policy. References herein are to the A & O Policy dated May 10, 2001, unless otherwise designated.

7 The FPHA A & O Policy has been amended to permit a five-year repayment schedule. See Pl.'s ex. 5 at 52.

8 The plaintiff has built or purchased sixty-five new units since the enactment of NAHASDA. Pl.'s ex. 7.

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No. 06-1425 & 06-1447
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FORT PECK HOUSING AUTHORITY,
Plaintiff - Appellee/Cross-Appellant,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; ALPHONSO JACKSON, Secretary of Housing and Urban Development; MICHAEL LIU, Assistant Secretary for Public and Indian Housing,
Defendants - Appellants/Cross-Appellees.

OGLALA SIOUX (LAKOTA) HOUSING; SICANGU WICOTI AWANYAKAPI CORPORATION; TURTLE MOUNTAIN HOUSING AUTHORITY; LOWER BRULE HOUSING AUTHORITY,
Movants.

ORDER

Before LUCERO, ANDERSON, and O'BRIEN, Circuit Judges.

Plaintiff/Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk